

Towards Indigenous Consent within Consultation in Resource Development: An Examination of  
Legal Standards for Consent on Aboriginal Title Lands

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## ABSTRACT

The Supreme Court of Canada has continuously held that the underlying purpose of section 35(1) of the *Constitution Act, 1982*, is the reconciliation of Crown sovereignty with pre-existing Indigenous societies. This judicial testament has paved the way for continual Indigenous demands for consent in resource development especially where Aboriginal lands are impacted. The need to seek and obtain Indigenous consent prior to commencement of major developments on their territorial lands, therefore, flow from the Crown's role as a fiduciary to Indigenous peoples and Canada's reconciliation objective as guaranteed under the constitution.

The thesis examines the current domestic requirement of consent when dealing with Aboriginal title in resource development. It explores ways of obtaining Indigenous consent from an Indigenous perspective. It seeks to contribute to the on-going discussion regarding the importance of Indigenous consent in resource development in Canada. It argues that although, highly useful, consultation is apparently insufficient in fulfilling the ultimate goal of reconciliation as held by the Supreme Court of Canada. Therefore, Indigenous consent to major projects on their lands appears to be the next reasonable step in the advancement of the Crown's reconciliation goal.

An examination of Aboriginal title as it engages resource development is undertaken. It also discusses the current regime of consultation with indigenous peoples through a critique of the jurisprudence on the legal duty to consult. Further, Indigenous decision-making processes using the Gitxsan Nation as a point of reference will be examined with a view to charting a model for obtaining consent in resource development.

Finally, this thesis concludes by making recommendations to existing consultation frameworks and policies on the legal and procedural standards for obtaining consent from Indigenous people in a manner that is consistent with their existing governance structures. This thesis is timely and relevant as it proposes to enhance stability in Canada's natural resource sector by advocating for the use of a model legal standard for consent rather than consultation when dealing on Aboriginal title lands. It also offers practical contributions to how consent can be obtained from Aboriginal title holders in a manner that takes into consideration a process proffered by Indigenous communities.

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# CHAPTER 1

## 1. Introduction and Context of Research Problem

Many Indigenous groups across the world view the doctrine of consent as a concept that advances their right to choose freely how their lands and resources should be used. Because any major resource development taking place on Indigenous land has the potential to impact their rights, there is the need to ensure that such development is carried out within the confines of applicable laws, regulations, and guidelines. Today, Indigenous consent is clearly required in certain circumstances. For example, international jurisprudence provides that consent would be required during large-scale development.<sup>1</sup> It would also be required when major dealings affecting Indigenous lands or traditional territories are contemplated by government.<sup>2</sup>

In Canada, Indigenous rights and title are affirmed and fully protected under section 35 of the *Constitution Act, 1982*. Also, the need for Indigenous consent was affirmed by the Supreme Court of Canada (SCC) decision in *Tsilhqot'in Nation v British Columbia*<sup>3</sup>. For the first time in Canadian legal history, the SCC declared in *Tsilhqot'in Nation* that the claiming Indigenous group had established title to land. The decision in *Tsilhqot'in Nation* makes it clear that Indigenous title-holders have a right to give or withhold their consent to any development or use that affects their lands.

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<sup>1</sup> *Saramaka People v Suriname*, (Judgment of November 28, 2007), IACHR Series C no 172, IHRL 3046 (IACHR 2007) at para 134 pdf online: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf)>. According to the Court, although States must consult with Indigenous peoples when involved in resource development projects on their traditional territories, there are some situations where a higher obligation may arise, for example, in a large-scale construction, warranting the need to obtain their free, prior and informed consent in accordance to their customs and traditions.

<sup>2</sup>Article 32(2) of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), Resolution 61/295 adopted by the General Assembly, 61st Session, Supplement No. 49 (September 13, 2007).

See also, Tara Ward, "The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights within International Law" 2011 Vol 10:2, *Northwestern Journal of International Human Rights* at 56 [Ward]. See further, Paul Joffe "Veto" and Consent" – Significant Differences" (13 July 2015) at 4, pdf online: <[http://www.afn.ca/uploads/files/2015\\_usb\\_documents/veto-and-consent-significant-differences-joffe-final-july-31-15.pdf](http://www.afn.ca/uploads/files/2015_usb_documents/veto-and-consent-significant-differences-joffe-final-july-31-15.pdf)>.

<sup>3</sup> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in Nation*].



This research proposes free prior and informed consent as the proposed legal standard for consent in resource development in Canada. This will be discussed in greater detail under chapters three and four of this thesis. Endorsed in 2010,<sup>4</sup> Canadian courts have been quite reluctant to embrace the full provisions of UNDRIP.<sup>5</sup> As such, some writers have come to believe that FPIC is a mere aspirational concept.<sup>6</sup> However, the objective of the thesis is to propose FPIC as the legal standard for consent in resource development and argue that where liberally and judiciously interpreted, section 35 protections can achieve FPIC in Canada.

With 171.0 billion barrels of crude oil in proven reserves, Canada has the third largest oil reserve in the world, following Venezuela and Saudi Arabia.<sup>7</sup> The exploration, exploitation and development of these resources have continued to interfere with the constitutionally-protected rights of Indigenous peoples of Canada. This interference has resulted in delays in the process of obtaining the requisite Certificate of Public Convenience and Necessity (“CPCN”) and other regulatory approvals. Indeed, this phenomenon has been identified by the industry as “First Nations issues” in the scheme of resource development.<sup>8</sup> In essence, if not properly addressed, the regulatory delays associated with Indigenous engagement could discourage investment in resource development in the Canadian economy.

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<sup>4</sup> Indigenous and Northern Affairs Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples”, online: <<http://www.aadncaandc.gc.ca/eng/1309374239861/1309374546142>>.

<sup>5</sup> Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, (Saskatoon: Purich Publishing, 2014) at 146 [Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples*]. The learned author said that “it is highly unusual for parties to attempt to make arguments based on customary international law, partly because of the difficulties of proving its contents and partly because Canadian courts are simply not used to those arguments.” See also, *Nunatukavut Community Council Inc. v Canada (Attorney General)*, 2015 FC 981 260 ACWS (3<sup>rd</sup>) 651.

<sup>6</sup> Ken S. Coates and Blaine Favel, “Understanding FPIC: From assertion and assumption on ‘free, prior and informed consent’ to a new model for Indigenous engagement on resource development” (April 2016), Macdonald-Laurier Institute Publication at 14 [Coates and Favel].

<sup>7</sup> Natural Resources Canada “Oil Resources” (February 19, 2016) online: <<http://www.nrcan.gc.ca/energy/oil-sands/18085>>. According to Natural Resources Canada, Canada accounts for 10% of the world’s proven oil reserves and it is predicted that this could grow even larger as technology evolves.

<sup>8</sup> Dawn Farrell, CEO of Trans Alta, while commenting on the delays associated with project development in Canada referred to “First Nation Issues” as one of such delays. She compares how, in Australia, it was easy to sign a deal in July as well as secure all permits by December of the same year “without cutting corners. See, Yadullah Hussain, Canada’s investment reputation on line if oil and gas projects delayed” (Financial Post: June 2, 2015), online: <<http://business.financialpost.com/commodities/energy/canadas-investment-reputation-on-the-line-if-oil-and-gas-projects-delayed>>.

In addressing the research goal, an examination of the meaning of Aboriginal title in Canada will be undertaken. As such, free, prior and informed consent (FPIC) as it relates to Aboriginal title lands will be the only focus of this research. As a unique right in land, Aboriginal title grants the right-holders the use of the land in a manner that is different from other land ownership in Canada. As a result of this special right in land, the Crown is constitutionally and legally bound to consult with the right and title holders, and where necessary, accommodate their interests.

Section 35(1) of the *Constitution Act* provides that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Also, the 2004/2005 trilogy cases of *Haida Nation v British Columbia (Minister of Forests)*<sup>9</sup>, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*<sup>10</sup>, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*<sup>11</sup>, fully entrench the legal duty of the Crown to consult with Indigenous peoples in Canadian jurisprudence. According to case law, all that is required to trigger consultation duties regarding Aboriginal rights and title is threefold: (1) that the Crown should have real or constructive knowledge of those rights or title;<sup>12</sup> (2) that the Crown is contemplating a project on Aboriginal land; and (3) that the contemplated project may adversely affect Aboriginal claim or right on the land.<sup>13</sup>

Further, this research will examine the role that the duty to consult plays in obtaining Indigenous approval to developments taking place on their lands and the deficiencies inherent in stopping at consultation (as required by law), as opposed to seeking Indigenous free, prior and informed consent. For illustrative purposes, this research will be examining Indigenous consent from the lens of the Gitksan Nation of British Columbia.

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<sup>9</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.

<sup>10</sup> *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* 2004 SCC 74, [2004] 3 SCR 550, 245 DLR (4<sup>th</sup>) 193 [*Taku River*].

<sup>11</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] SCC 69, [2005] 3 SCR. 388, [2005] SCJ. No. 71. [Mikisew Cree 2005].

<sup>12</sup> Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, *supra* note 5 at 39. The learned author and foremost authority on the duty to consult doctrine in Canada stated that when the Crown has constructive knowledge of an action that may be in breach of an Aboriginal right, the knowledge element is met; and at p 48; that real or constructive knowledge does not include a reorganization of governance structure since this is dependent on what the new governance structure chooses to do.

<sup>13</sup> *Haida Nation*, *supra* note 9 at 36.

The Gitksan people have a long history of demanding the recognition of their rights and making claims to their traditional territories. As such, sufficient past research work exists that the present project can rely upon.<sup>14</sup> By looking at consent from the perspective of the Gitksan peoples, it becomes evident that consultation is no longer sufficient, rather; obtaining their informed consent prior to any major development taking place, is the most assured means of legitimately maximizing Canada's resource wealth, as well as conforming to international standards on Indigenous peoples' rights to give or withhold their consent.

Chapter one of this research will lay a foundation for a broader understanding of the meaning of Indigenous consent by examining the instances where agreements are reached in resource development and ways that the free, prior and informed consent of Indigenous title holders have become more broadly important. This chapter is highly significant as it discusses existing standards of seeking Indigenous approval to projects and how they compare to proposed FPIC standard later in chapters four and five.

As a proposed standard, this thesis discusses FPIC as a way of fulfilling the Crown's obligation to Indigenous peoples especially when a contemplated project is likely to have a profound impact on Indigenous lands. The duty to consult is discussed in chapter three, however, the discussion of FPIC as articulated under the UNDRIP, is highly relevant to chapters one, four and five since this thesis proposes that absent Indigenous consent during consultation, projects should not proceed on their lands.

The need to obtain Indigenous peoples' consent in the absence of an agreement or established title arises from the recognition of the need to respect Aboriginal rights to self-governance, cultural rights, and religious rights, and it may well also be a good business practice that supports smooth execution of projects taking place on their lands.<sup>15</sup> Although at least somewhat effective in opening up dialogues and relationship-building avenues between the Crown and Indigenous

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<sup>14</sup> Gitksan, *Gitksan History of Resistance*, online: < <http://www.gitksan.com/culture/culture-history/gitksan-history-of-resistance>>.

<sup>15</sup> Cathal Doyle & Jill Cariño "Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector" (2013), at 19, online: < <http://solutions-network.org/site-fpic/files/2012/09/Making-Free-Prior-Informed-Consent-a-Reality-DoyleCarino.pdf>> [Doyle and Carino].

peoples, consultation without consent is likely to be insufficient in fulfilling the ultimate goal of reconciliation described by the SCC in *Delgamuukw*.<sup>16</sup>

It is important to clarify that reference to “consent” throughout this thesis is in the nature of consent as described by the SCC in the *Tsilhqot’in Nation* decision.<sup>17</sup> The concept of “FPIC” is that articulated by the UNDRIP provisions. This distinction is important because FPIC has not yet gained legislative acceptance in Canada, whereas its consultation counterpart has. This area of law is in flux and the existing FPIC literature is mostly derived from the Declaration which in turn is not legally binding in Canada. For example, In *Sackaney v. R*,<sup>18</sup> the court held that because UNDRIP has not been ratified in any manner by Parliament, it does not give rise to any substantive rights in Canada. As such, the implementation of UNDRIP provisions in Canada can be achieved only through the parliamentary process. However, the decisions in *Nunatukavut Community Council Inc. v. Canada (Attorney General)*<sup>19</sup> and *Elsipogtog First Nation v. Canada (Attorney General)*,<sup>20</sup> show that the courts are leaning towards an interpretation that embodies the values of the Declaration. If Canada decides to implement the Declaration, it will be bound to obtain the consent of Indigenous groups prior to commencing resource development projects on their territorial lands. This thesis argues that this is the most assured means of fulfilling the Crown’s fiduciary obligations to Indigenous peoples.

The issue of implementing FPIC within domestic laws is easier said than done because it has been interpreted as giving Indigenous peoples the right to veto and control resource developments on their traditional lands. However, some writers, such as Mauro Barelli, are of the view that FPIC should not be considered by States as restrictive but rather simply as “imposing a stringent obligation on States” to obtain indigenous consent.<sup>21</sup>

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<sup>16</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 165, 153 DLR (4th) 193 [*Delgamuukw*].

<sup>17</sup> *Tsilhqot’in Nation*, supra note 3 at 76.

<sup>18</sup> *Sackaney v. R*, 2013 TCC 303.

<sup>19</sup> *Nunatukavut*, supra note 5 at para 96.

<sup>20</sup> *Elsipogtog First Nation v. Canada (Attorney General)*, 2013 FC 1117 at para 121.

<sup>21</sup> Mauro Barelli, “Free Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead”. (2012) *The International Journal of Human Rights*, Vol. 16, No. 1 at 21.

Other writers have analyzed how FPIC should be interpreted in light of the literal meaning of its components. According to S.J. Rombouts, “free” means the ability of indigenous peoples to have discursive control over a dialogue while making decisions related to their lands; “prior” means having the ability to make decisions before development is commenced and that consent to such development should be on-going and should last throughout the duration of the project.<sup>22</sup> This interpretation is also endorsed by Cathal Doyle and Jill Carino, where after interviewing some Indigenous representatives in Canada, these scholars identified that some communities expect and require that consent should be maintained throughout the duration of the project and even renewed yearly and until the end of the project.<sup>23</sup> As such, it is hard for project proponents to make investment decisions if Aboriginal consent could be obtained in the first few years but later denied when resource development have commenced. Further, S.J. Rombouts refers to “informed” as a sine qua non with regards to the validity of the entire process, while “consent” requires that it must have been given by the lawfully delegated authority.<sup>24</sup>

In support of the view that FPIC does not amount to a veto power, Sébastien Grammond has argued that Article 32 of UNDRIP should be pursued as a goal rather than perceived as a “veto power” reposed in Indigenous peoples.<sup>25</sup> As the goal of consultation, it is more likely to achieve the objectives of section 35 of the *Constitution Act, 1982*. Perhaps making a related point, Dwight Newman has said that it is possible for Canadian courts to gradually accept the provisions of the Declaration if it is treated as an aspirational document.<sup>26</sup>

In the extractive industry, the International Council on Mining and Metals (ICMM) has taken positive steps towards adopting FPIC. In their 2013 Position Statement (the “Statement”), the body outlines its commitment to working with indigenous peoples in order to obtain their consent where projects are located on traditionally owned lands.<sup>27</sup> Particularly, their fourth

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<sup>22</sup> S.J. Rombouts, *Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers, Oisterwijk, Netherlands: 2014) [Rombouts].

<sup>23</sup> Doyle and Carino, *supra* note 15 at 47.

<sup>24</sup> Rombouts, *supra* note 23 at 65.

<sup>25</sup> Sebastian Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law*, (Carswell, Toronto: 2013) at 165.

<sup>26</sup> Newman, *supra* note 5 at 151.

<sup>27</sup> International Council on Mining and Metals (ICMM), May 2013. “Indigenous Peoples and Mining” Position Statement at 4. [the “Statement”] online at: <<http://www.icmm.com/document/5433>>.

commitment sheds more light on their understanding of FPIC. It provides that “consent processes should focus on reaching agreement on the basis for which a project should proceed.” Also, it provides that FPIC does not confer a veto power on Indigenous groups nor does it mandate companies to agree to “aspects not under their control.” Rather, FPIC should enable Indigenous peoples to be aware of projects on their lands and how it would impact and benefit them as a community or group. On this, Sauer, Chiodini and Duong note that the ICMM’s Statement still presents uncertainties in resource development because of the lack of understanding of FPIC by industry.<sup>28</sup> The different interpretations given to the term “consent” by industry, government and indigenous peoples also make it difficult to fully grasp the legal implication of the adoption of the doctrine in Canada and abroad.

Currently in Canada, the SCC jurisprudence on consent is that it is required when title to land has been established since this constitutes a judicial acknowledgement of Indigenous people’s rights as owners of the land “to proactively use and manage the land.”<sup>29</sup> Consent is also required when any amendment to an existing treaty right is proposed. Further, accommodation of Indigenous rights may be reached through negotiated agreements when contemplated projects are likely to infringe on Indigenous treaty rights in view of Crown’s honourable dealings expectation.<sup>30</sup> According to the Court in *Haida Nation v British Columbia (Minister of Forests)*, “the effect of good faith consultation may reveal a duty to accommodate,”<sup>31</sup> and accommodation may take the form of negotiating Indigenous approval through contractual agreements leading to the signing of Impact and Benefit Agreements (IBAs).

IBAs have been used and found to be efficient in ensuring that certain economic benefits accrue to Indigenous groups impacted by resource development projects on Indigenous lands.<sup>32</sup> Through IBAs, the consent of Indigenous communities is sought and obtained. This is further discussed in pages 15 and 97-99 of this thesis. IBAs are utilized as a freestanding agreement or under the

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<sup>28</sup> Luke Sauer, Jaclynn Chiodini and Christine Duong, (July 2015) “Consent within Consultation: Incorporating New Business Practices in the Extractive Industry” Policy Brief, CIGI Graduate Fellows (CGF) Series, No 3 at 44.

<sup>29</sup> *Tsilhqot’in Nation*, *supra* note 3 at 94.

<sup>30</sup> *Haida Nation*, *supra* note 9 at para 19.

<sup>31</sup> *Ibid.*, at 47.

<sup>32</sup> Ken J. Caine & Naomi Krogman, “Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada’s North” (2010) *Organization & Environment*, Vol. 23, Issue 1, pp. 76 - 98 at 77.

requirements of modern treaties, which are in turn protected under sections 25 and 35 of the *Constitution Act, 1982*. An example of where a modern treaty explicitly demands consent through the use of IBAs can be found under Article 26 of the *Nunavut Land Claims Agreement* which provides that an Inuit Impact and Benefit Agreement (IIBA) must be concluded prior to any major development taking place. This provision exists in order to ensure that any proposed project, on one hand, accounts for the environmental externalities on the Inuit people, and, on the other hand, to ensure that the people enjoy economic and financial benefit therefrom.

Further, chapter one will examine other areas where consent is mandated by regulatory bodies and statutes, for example, the National Energy Board and the *British Columbia Environmental Assessment Act*. Finally, consent as required under international instrument, such as the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) will be discussed.

Chapter two will discuss in detail the meaning of Aboriginal title in Canada. Because Indigenous title is “a right to the land itself,”<sup>33</sup> it allows Indigenous peoples an uninterrupted use and control of their lands. Therefore, it is more prudent to seek Indigenous consent prior to infringement. According to the SCC, failure to obtain Indigenous consent can result in cancellation of projects unless justified by a compelling and substantial public purpose in line with the Crown’s fiduciary obligations to the Aboriginal people of Canada.<sup>34</sup>

Chapter three examines the laws relating to consultation with Indigenous peoples in Canada. Because of their status as foremost dwellers in Canada, the law requires the Crown to consult and where necessary, accommodate concerns raised through the consultation process. In chapter four, consultation processes of the federal government, British Columbia and a birds-eye-view of Indigenous governance structure is examined. In particular, chapter three examines how consent may be obtained from Indigenous groups by looking at the meaning and importance of consent to a select group of the Gitksan Nation of British Columbia. In providing answers to the task in chapter four, the discussion will pivot around the following issues: which institution should dictate the forms in which consultation with Indigenous groups should take - the government, the courts or Indigenous title-holders/decision-makers? This question will foreground my discussion

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<sup>33</sup> *Delgamuukw*, *supra* note 16 at 140.

<sup>34</sup> *Tsilhqot’in Nation*, *supra* note 3 at para 2.

on the consultation duties of the Crown leading to consent from title-holders/claimants in resource development.

An examination of the decision-making process and the political structure of the Gitxsan Nation of British Columbia is undertaken in order to shed light on how their cultural practices and legal traditions may be instrumental in fashioning policies and practices on consultation leading to acquiring consent. In the years after the *Delgamuukw v British Columbia* action was brought by the Gitxsan and Wet'suwet'en communities, the Gitxsan Nation has developed and implemented a more structured political government which reflects their historical practices as well as infusing a modern political administration, thereby, giving a new meaning to Indigenous traditional governance. These infused governance structures, although not without their problems, will highlight how agreements are achieved within Indigenous communities.

With a focus on British Columbia, existing consultation policies in the Province will also be examined. These policies were primarily drafted by government officials taking cues from court decisions, with minimal consideration of traditional Indigenous perspectives on consultation. Rather than addressing this apparent conflict issue, the Court in *R v Sparrow*<sup>35</sup> devised the “override provision” which allows the Crown to proceed with development on title lands without the consent of Indigenous title holders, as long as the conditions set out in *Sparrow* are met.<sup>36</sup> The implication of Crown exercise of this power translates to an absence of legitimacy from Indigenous groups, and this fails to meet the international standards expressed in the UNDRIP with regards to Indigenous peoples' consent in resource development.

The research concludes in Chapter five after discussing how Indigenous decision-making process (using the Gitxsan people in British Columbia in chapter four) can be utilized in obtaining consent as the goal of Crown-Aboriginal consultation. With freely obtained, informed consent, the government is assured that it has obtained approval to a third-party incursion on Aboriginal title lands.

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<sup>35</sup> *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

<sup>36</sup> *Tsilhqot'in Nation*, *supra* note 3 at para 76.



## 1.1. Consent of Indigenous Communities in Resource Development: Existing Standards in Canada

After several decades of litigating Indigenous title rights in Canada, it is now recognized that Indigenous peoples have a right to freely consent to the use of Aboriginal title land stemming from sufficient, continuous and exclusive occupation of the land.<sup>37</sup> This right stems from the fact that they have been occupying the lands prior to the arrival of European settlers. As a result, there are recognized instances where consent is required from Indigenous people in Canada, and this Chapter will examine some of those instances for the purpose of understanding existing Canadian jurisprudence on the requirement of consent on Indigenous lands. The aim is to highlight the existing practices on obtaining consent of Indigenous communities in resource development. In executing this objective, its failings would also be identified.

The existing standards, such as statutory and regulatory requirement, and the common law duty to consult, although, highly effective, lack the legitimacy that consent confers since it is subject to Crown override as laid down in *Sparrow*.<sup>38</sup> For instance, in the case of treaty lands in Canada, even though the jurisprudence in *Haida Nation* mandates the Crown to consult with Indigenous treaty right holders before taking any action that could impact their treaty rights, government is still not bound to stay developments on such lands while waiting on Indigenous right holders for consent.<sup>39</sup> As such, existing jurisprudence that requires the government to consult with Indigenous peoples fail to ensure stability in Canada's resource industry. Unfortunately, several projects continue to suffer from the repercussions of proponents' inability to proceed due to lack of Indigenous consent.<sup>40</sup>

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<sup>37</sup> *Tsilhqot'in Nation*, *supra* note 3 at para 25.

<sup>38</sup> *Sparrow*, *supra* note 35 at 111.

<sup>39</sup> JoAnn P. Jamieson and William M. Laurin, "Aligning Resource Development with the Interests of Aboriginal Peoples of Canada" (2015) 53 Alta L. Rev at 55 [Jamieson].

<sup>40</sup> An example of a recent project cancelled for lack of Indigenous consent is Limestone Quarry Project on the Bruce Peninsula; see Jean Levac, "Ontario Court halts quarry project over lack of consultation with First Nations" (National Post: July 18, 2017) online: <<http://nationalpost.com/news/national/ontario-court-halts-quarry-project-over-lack-of-consultation-with-first-nations>>.

See also, James Anaya, *Extractive Industries and Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, submitted to the Human Rights Council in accordance with Council Resolutions 6/12 &

In order to reduce the chances of government and third-party infringement of Indigenous treaty and title rights, both private and public-sector industries are beginning to accept and indeed, entrench the requirements of FPIC in various other sectors where Indigenous lands are being utilised for development. An easily identifiable example is the Forest Stewardship Council which has partnered with the National Aboriginal Forestry Association to engage in discussions on how FPIC with Indigenous groups would strengthen forest certification requirements in the forest industry.<sup>41</sup>

This research will primarily focus on title lands due to the importance of the *Tsilhqot'in Nation* decision on the issues of Indigenous consent in title lands. This will lead to a broader discussion of consent within Canadian jurisprudence and international standards of Indigenous consent in resource development under the UNDRIP provisions. Ultimately, the goal is to generate suggestions in response to questions raised by stakeholders in resource development, as well as to show how Indigenous consent is preferable to justifying an infringement in accordance with

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15/14 UN document A/HRC/24/41, (July 1, 2013), at 4, online: <<http://unsr.jamesanaya.org/study/report-a-hrc-24-41-extractive-industries-and-indigenous-peoples-report-of-the-special-rapporteur-on-the-rights-of-indigenous-peoples>>. James Anaya's Report shows that Indigenous people worldwide are beginning to own companies engaged in resource development worldwide. This means that several Indigenous groups are no longer satisfied with sitting on the side-lines and waiting for the government to recognize their rights to dictate how their lands would be used in resource development. Rather, they now own several companies that allow them to "engage in oil and gas production, manage electric power assets, or invest in alternative energy." Indeed, this is preferable because it allows the resource developer the advantage of gaining knowledge of Indigenous peoples' traditional laws and beliefs that affects their land and in turn, it minimizes the possibility of an infringement of their internationally recognized rights. In essence, his report summarizes that Indigenous peoples' participation in extractive industry is a plus for any government looking to ensure stability in its resource industry as this is more likely to ensure that the consent of affected Indigenous communities is obtained all through the life of the project. For example, an Ontario Court recently stopped T & P Hayes Ltd., from proceeding with a limestone quarry project on the Bruce Peninsula because the Ontario Ministry of Natural Resources and Forestry failed to properly fulfil its constitutional duty to consult with the Saugeen Ojibway First Nation.

<sup>41</sup> Monika Patel, "Free, Prior and Informed Consent", Forest Stewardship Council, online: <<https://ca.fsc.org/en-ca/our-work/forest-management-standard-revision-01/free-prior-and-informed-consent>>. See also, Monika Patel "Forest Stewardship Council (FSC) launches leading initiative to Strengthen Aboriginal Peoples' Rights in Canadian Forests" (January 27, 2014), Forest Stewardship Council, online: <<http://www.newswire.ca/news-releases/forest-stewardship-council-fsc-launches-leading-initiative-to-strengthen-aboriginal-peoples-rights-in-canadian-forests-513617531.html>>.

the *Sparrow-Tsilhqot'in Nation* justification test which is discussed in chapter two of this thesis.<sup>42</sup>

## **1.2. Domestic Standards of Consent of Indigenous Communities in Resource Development**

In seeking to obtain Indigenous support for a resource development project on their lands, regulatory and statutory requirements, as well as the constitutional duty to consult, have been devised. While free, prior and informed Indigenous consent remains the ideal goal, resource developers and Indigenous groups have often utilized contractual agreements as one of the means of negotiation in order to negotiate some of the terms in which exploitation, exploration, and production proceed on Indigenous lands.<sup>43</sup> For example, IBAs are one of such ingenious negotiating instruments.

An IBA is “a negotiated, private agreement that documents in a contractual form the benefits that a local community can expect from the development of a local resource in exchange for its support and cooperation.”<sup>44</sup> IBAs often contain detailed information as to what affected Indigenous land claimants demand in exchange for their consent to projects that would entail

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<sup>42</sup> In *Sparrow*, the SCC laid out a test for how government may be justified in infringing existing Aboriginal and Treaty rights that are protected under section 35 of the Constitution. Under the test, an infringement might be justified if 1.) It serves a valid legislative objective; and 2) the government's actions must be consistent with its fiduciary duty towards Aboriginal peoples. Where the government decided that a valid legislative objective exists, it is required to further ensure that a) there has been as little infringement as possible; b) fair compensation has been paid in the case of expropriation of lands, and c) the affected Aboriginal groups were consulted.

<sup>43</sup> Ibironke T. Odumosu-Ayanu, “Indigenous Peoples, International Law, and Extractive Industry Contracts” (2015) 109 AJIL Unbound 220 at 221.

<sup>44</sup> Irene Sosa & Karyn Keenan, “Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their use in Canada” for Canadian Environmental Law Association (CELA: 2001) at 2 [Sosa & Keenan], where IBAs are defined simply as a tool used for establishing formal relationships between mining companies and the local communities. Further, see Dwight Newman, *Natural Resource Jurisdiction in Canada*, (Markham: LexisNexis, 2013). See also, Ben Bradshaw & Courtney Fidler, “Impact and Benefit” *IBA Research Network*, online: <<http://www.impactandbenefit.com/Background/>>.

exploitation and development on their land.<sup>45</sup> Often, this comes in the form of financial compensation to the Indigenous groups impacted by the project.<sup>46</sup>

Today, IBAs are used in several ways to obtain Indigenous consent often before any resource development taking place. For example, the provisions of a land claim agreement may require that an IBA or a “Participation Agreement” be negotiated prior to resource development taking place on Indigenous lands.<sup>47</sup> Alternatively, governments may have specific regulatory requirement that IBAs must be made so as to ensure that governmental fiduciary obligations towards Indigenous peoples are met.<sup>48</sup>

There are some circumstances where IBAs are required in Canada, some of which will be further discussed in this chapter.<sup>49</sup> According to the court in *Haida Nation*, the Crown may be required

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<sup>45</sup> Isabella Pain & Tom Paddon, “Negotiating Agreements: Indigenous and Company Experiences: Presentation of the Voisey’s Bay Case Study from Canada,” a paper delivered at the International Seminar on Natural Resource Companies, Indigenous Peoples and Human Rights: Setting a Framework for Consultation, Benefit-Sharing and Dispute Resolution at Moscow (December 3-4, 2008) at 5. See also, Ibironke T. Odumosu-Ayanu, “Indigenous Peoples, International Law, and Extractive Industry Contracts”, *supra* note 43 at 223.

<sup>46</sup> The Labrador Inuit Land Claims Agreement, (the “*Agreement*”). Part 6.7.3 of the Agreement provides that an Inuit IBA “may provide for any matter connected with a Major Development in the zone...that could have a detrimental impact on Inuit or could reasonably confer a benefit on Inuit. See Indigenous and Northern Affairs, “Land Claims Agreement between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada”, online: <[www.aadnc-aandc.gc.ca/eng/1293647179208/1293647660333](http://www.aadnc-aandc.gc.ca/eng/1293647179208/1293647660333)>.

<sup>47</sup> Indian and Northern Affairs Canada “The Western Arctic Claim, Inuvialuit Final Agreement”, online: <[http://webarchive.bac-lac.gc.ca:8080/wayback/20071125181720/http://www.ainc-inac.gc.ca/pr/agr/inu/wesar\\_e.pdf](http://webarchive.bac-lac.gc.ca:8080/wayback/20071125181720/http://www.ainc-inac.gc.ca/pr/agr/inu/wesar_e.pdf)>. See Chapter 10(2) of the Western Arctic Claim, Inuvialuit Final Agreement requires proponents to conclude a Participation Agreement with the Inuvialuit Lands Administration except otherwise agreed to.

<sup>48</sup> Indigenous and Northern Affairs Canada “Land Claims Agreement between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada” online: <<https://www.aadnc-aandc.gc.ca/eng/1293647179208/1293647660333#chp6>>. Specifically, Part 6.7 Inuit Impact and Benefits Agreement in the Zone provide that except under enumerated instances, IBAs must be entered with the Nunatsiavut Government prior to any development on their lands. See also, Sosa and Kenan, *supra* note 16 at 7-8.

<sup>49</sup> IBAs are statutorily required in some land claims agreements, for example, the Nunavut Land Claims Agreements and the Inuvialuit Final Agreement. For more, see Sandra Gogal, Richard Riegert & JoAnn Jamieson, “Aboriginal Impact and Benefit Agreements: Practical Considerations” (2005-2006) 43 Alta L. Rev. 129 at 130 [Gogal, Riegert & Jamieson].

to enter into an IBA based on the nature of the rights held by the Indigenous community.<sup>50</sup> In essence, the Crown may need to accommodate the concerns of Aboriginal title claimants by minimizing the impact of a proposed action through accommodation which could be in the form of IBAs. Further, IBAs are required under certain land claims agreements, for example, the *Labrador Inuit Lands Claims Agreement* and the *Nunavut Land Claims Agreement* as mentioned earlier. Indigenous community approval arrived at by negotiated agreements, (such as Impact/Mutual Benefit Agreement) can also be a conditional requirement by some regulatory bodies, e.g., the National Energy Board, prior to issuing the requisite CPCN for a project on Aboriginal title lands.<sup>51</sup>

### **1.2.1. When Indigenous Approval may be Obtained as a Result of Accommodation During Consultation**

The principle of the Crown's duty to consult and where appropriate, accommodate Indigenous peoples' interest is examined in more detail in chapter three of this thesis; therefore, only a brief discussion will be undertaken in this chapter. For the purpose of examining the requirement for IBAs arising from the duty to consult, it is sufficient to recognize that its origin can be traced to the Crown's section 35 constitutional duties to Indigenous peoples of Canada. This constitutional duty exists in recognition of the fact that Indigenous people have occupied Canada before any other group arrived. As such, the duty to consult is imposed both as a matter of law,<sup>52</sup> as well as protected by section 35 (1) of the *Constitution Act, 1982*, whereby "existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed." *Ipso facto*, what this means is that where title has not been claimed or where treaties have not been finalized, the duty to consult doctrine will fill in the gap and ensure that Indigenous groups occupying the land are

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<sup>50</sup> *Haida Nation*, *supra* note 9 at 42-45.

<sup>51</sup> The National Energy Board Panel (established by virtue of NEB Act R.S.C., 1985, c N-7) that reviewed the Trans Mountain Project Application recommended 157 conditions, including several economic and financial benefit to be accorded to affected Indigenous community, should the project proceed. These economic benefits were delivered to the affected community by means of contractually negotiated benefit agreements. See also, Gogal, Riegert & Jamieson, at 140.

<sup>52</sup> *Beckman v Little Salmons/Carmacks First Nation*, 2010 SCC 53 at para 69, [2010] 3SCR 103, 326 DLR. (4<sup>th</sup>) 385 [Little Salmons/Carmacks First Nation].

protected whenever resource development is proposed on their lands. This protection may take the form of a Land Claim Agreement with IBA provisions embedded therein.<sup>53</sup>

Although the fulfilment of the duty to consult is primarily the government's obligation,<sup>54</sup> it can be argued that perhaps, it is easier to delegate this duty to third parties because of the multiple hats that government wears in terms of protecting both its Indigenous and non-Indigenous citizens. As such, in *R v Sparrow*, the court recognized the "increasingly complex" role that government plays in society; therefore, it provides a means for government to infringe "recognized and affirmed" Aboriginal rights by justifying such infringement.<sup>55</sup> Again, this is no easy feat for the government since there can be several and multiple intersecting rights to consider prior to making a decision to infringe any Indigenous groups' rights. The *Sparrow* decision however provides that an infringement can be justified if there is a valid legislative objective and it goes ahead in providing certain questions as a guide to help the government in determining whether or not such valid legislative objective exists.<sup>56</sup> Ultimately, Indigenous interests will still have to be taken into consideration resulting from consultation with the government, while the accommodation aspect are usually negotiated between affected Indigenous groups and industry, which in turn may take the form of an IBA.<sup>57</sup>

In some cases, when parties enter into IBAs as a result of fulfilling the government's duty to consult with Indigenous groups, they are assuring one another that they agree under the terms of the contract to firstly, on the part of the Indigenous groups, provide their approval to the project proceeding on their lands and secondly, for the project proponents to make available financial benefits or compensations to the affected Indigenous groups for making use of their lands. As such, IBA is one of the most assured means of obtaining Indigenous approval. It also allows the

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<sup>53</sup> Gogal, Riegert & Jamieson, *supra* note 49 at 134.

<sup>54</sup> *Haida Nation*, *supra* note 9 at 53.

<sup>55</sup> The *Sparrow* test requires the government to consider the following: 1. whether the legislation in question has the effect of interfering with an existing aboriginal right; and if yes, 2 (a). Whether there is a valid legislative objective; (b) whether that objective can be justified, which will include considerations as to whether there has been as little infringement as possible; whether in situation of expropriation, fair compensation is available and whether aboriginal groups affected had been consulted. See generally, *sparrow*, *supra* note 17 at paras 67-83.

<sup>56</sup> *Ibid.*, at 111.

<sup>57</sup> Grammond, *supra* note 25 at 277.

government to rest assured that affected Indigenous groups have been consulted and that they were fairly engaged in reaching the negotiated agreement.

Accommodation of Indigenous rights is not always imposed in every situation since the need may not arise after consultation has taken place.<sup>58</sup> However, parties are enjoined to act in good faith during consultation so that it can be meaningful and productive to allow Indigenous groups and other stakeholders to bring forward their concerns. These concerns are usually addressed in the form of accommodation taking the shape of agreements. According to the Haida Nation Court, “honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants’ inherent rights”<sup>59</sup> As a result of good faith consultation, the parties could reach an agreement which enables the Crown to accommodate the affected Indigenous group’s interests.<sup>60</sup> Also, the court in *Nunatsiavut v Canada (Department of Fisheries and Oceans)*,<sup>61</sup> gave judicial recognition to how honourable negotiation between the Crown and Indigenous communities can lead to agreement as a result of consultation.<sup>62</sup>

What this means to project proponents is that if the duty to consult is not properly carried out in a manner that reflects the honour of the Crown, the project could be delayed or even cancelled until proper consultation have been done reflective of Indigenous interests at stake. However, where consultation does not lead to accommodation, the courts have held that at the very least, the process should provide an explanation why the Indigenous people’s position was not accepted. In essence, it should be a meaningful process yielding reasoned results and not a ground for Indigenous peoples to “blow off steam.”<sup>63</sup> This is why the government strongly leans

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<sup>58</sup> *Haida Nation*, *supra* note 9 at para 10. See also, *Taku River*, *supra* note 10 at para 193, where the court held that “where consultation is meaningful, there is no ultimate duty to reach an agreement.” Further, see *Tzeachten First Nation v. Canada (Attorney General)*, 2008 FC 928 at para 75, 297 DLR (4th) 300.

<sup>59</sup> *Haida Nation*, *supra* note 9 at para 26.

<sup>60</sup> *Little Salmon*, *supra* note 52 at para 61. The Court held that “consultation can be shaped by agreements of the parties...” Therefore, because of good-faith consultation, the honour of the Crown, in certain circumstances, can compel the government to reach an agreement with the Indigenous groups for the purpose of accommodating their concerns in a proposed natural resource development project. See also, Tom Isaac and Anthony Knox, “Canadian Aboriginal Law: Creating Certainty in Resource Development” (2004) 3 UNBLJ 53 at 13 [Isaac & Knox].

<sup>61</sup> *Nunatsiavut v Canada (Department of Fisheries and Oceans)* 2015 FC 492, 2015 CF 492 [Nunatsiavut].

<sup>62</sup> *Ibid.*, at para 125.

<sup>63</sup> *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA at paras 148-149, 333 DLR (4<sup>TH</sup>) 31.

towards an agreement being reached between resource developers and Indigenous groups, usually in the form of an IBA, prior to commencement of a project on Indigenous lands.<sup>64</sup>

### 1.2.2. Statutory Requirement to Obtain Indigenous Consent under Modern Treaties

Statutory requirement to reach an agreement derives its source from the honour of the Crown and “infuses the processes of treaty making.”<sup>65</sup> In *Haida Nation*, the court held that the honour of the Crown ultimately “requires negotiations leading to a just settlement of Aboriginal claims.”<sup>66</sup> This could lead to the negotiation of agreements, such as the land claims agreement between Canada or provincial/territorial government and Indigenous groups. Currently, there are 26 signed comprehensive land claim agreements and 100 more are being negotiated across Canada.<sup>67</sup>

Land claim agreements, also described as modern treaties under section 35(3) of the *Constitution Act, 1982*,<sup>68</sup> often contain some provisions which would compel or require project proponents to enter into a form of agreement with Indigenous groups before proceeding with natural resource exploitation on their lands. Examples of such obligations to finalize an IBA can be found in Part 6.7.1 of the *Labrador Inuit Lands Claims Agreement*,<sup>69</sup> and Article 26.2.1 of the *Nunavut Land Claims Agreement*.<sup>70</sup> An example of such agreements was signed by Baffinland and the Qikiqtani Inuit Association (QIA) for the Mary River Project in September 2013.<sup>71</sup>

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<sup>64</sup> Grammond, *supra* note 25 at 277.

<sup>65</sup> *Haida Nation*, *supra* note 9 at para 19.

<sup>66</sup> *Ibid.*, at 20.

<sup>67</sup> Indigenous and Northern Affairs Canada, “Comprehensive Claims” online: <https://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578>.

<sup>68</sup> *Nunatsiavut*, *supra* note 61 at para 124.

<sup>69</sup> *Labrador Inuit Land Claims Agreement Act*, S.N. 2004, c. L-3.1.

<sup>70</sup> Article 26.2.1. of the “Agreement between the Inuit of the Nunavut Settlement area and Her Majesty the Queen in Right of Canada” online: [http://webarchive.bac-lac.gc.ca:8080/wayback/2005122235906/http://www.ainc-inac.gc.ca/pr/agr/pdf/nunav\\_e.pdf](http://webarchive.bac-lac.gc.ca:8080/wayback/2005122235906/http://www.ainc-inac.gc.ca/pr/agr/pdf/nunav_e.pdf).

<sup>71</sup> Baffinland, “Inuit Impact and Benefit Agreement”, available online: <http://www.baffinland.com/sustainable-development/inuit-impact-and-benefit-agreement/?lang=en>.



Land Claims Agreements impose a duty to enter into IBAs with Indigenous communities before any major development can take place on their land. In essence, it sets out the circumstances under which Indigenous consent to any major development is legally mandated.

Further, the requirement for consent would also arise when government proposes to amend or extinguish Aboriginal rights protected under a modern treaty. An example is the *James Bay and Northern Quebec Agreement* (JBNQA) which was the subject of judicial interpretation in *Corp. Makivik c. Quebec (Procureur general)*.<sup>72</sup> In this case, the Court of Appeal for Quebec held that the rights protected under the JBNQA could not be amended or extinguished absent Indigenous consent or notwithstanding actions of both federal and provincial legislature.<sup>73</sup> This is because the rights in the JBNQA is constitutionally protected by virtue of sections 25 & 35 of the *Constitution Act, 1982* and therefore, constitutes a modern treaty.

Statutory requirement for Indigenous approval on a project can also take the form of government legislation such as the *Canada Oil and Gas Operations Act*.<sup>74</sup> The Act provides that some form of benefit plan must be approved or waived by the Minister before a development plan may be granted. Although, not comparable to the nature of consent obtainable with FPIC, this benefit plan ensures that the impacted community have been consulted, and that they contractually agree to the project proceeding under certain (usually confidential) terms and conditions. Usually, monitoring bodies such as the National Energy Board or Ministries will mandate the fulfilment of a requirement prior to approving any resource development plan.<sup>75</sup> Examples of pre-approval clauses could take the form of minister's approvals, provision for employment, training and

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<sup>72</sup> *Corp. Makivik c. Québec (Procureur général)*, 2014 QCCA 145, referred to in Gogal, Riegert & Jamieson, *supra* note 49 at 136.

<sup>73</sup> *Ibid.*, at para 53. The court however, recognized that the only means of justifying an infringement of these rights under the JBNQA would be by meeting the justification test laid out in *Sparrow* *supra* note 19 at para 1109.

<sup>74</sup> Section 5 (2) of the *Canada Oil and Gas Operations Act*, (RSC 1985 c 0-7), provides that "no approval of a development plan shall be granted under subsection 5.1(1) and no authorization of any work or activity shall be issued under paragraph 5(1)(b), until the Minister has approved, or waived the requirement of approval of, a benefits plan in respect of the work or activity."

<sup>75</sup> Gogal, Riegert & Jamieson, *supra* note 49 at 137.

education for affected Indigenous communities and youths or the opportunity for a fair playing ground to bid as suppliers of raw materials used in the project.<sup>76</sup>

Another mandatory statutory requirement for project proponents to obtain consent prior to commencing a project can be found under *section 8.1* of the *British Columbia Environmental Assessment Act, 2002*,<sup>77</sup> which provides that:

Despite any other enactment and whether or not an environmental assessment certificate is required, a reviewable project may not proceed on treaty lands without the consent of the treaty first nation if the final agreement requires this consent.

Section 6(2) of the *Act* defines reviewable project to mean “one for which an environmental assessment certificate is required.” As such, statutory provisions such as these would ensure that proponents obtain the consent of Indigenous nations who have entered into final agreements with the government containing such consent provisions.

IBAs also contain provisions that list the negative effects, including environmental and change of lifestyle, on the Indigenous community impacted by the proposed project, as well as the steps both parties would take to mitigate these negative impacts.<sup>78</sup> This ensures that there has been adequate consultation with the affected Indigenous community leading to a contractual agreement to adhere to each other’s promises as listed in the agreement.

Also, Indigenous Nations that have signed modern treaties also have law-making authority in relation to for example, the protection of local air quality or environmental

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<sup>76</sup> *Ibid.*, at 138.

<sup>77</sup> *British Columbia Environmental Assessment Act*, (SBC 2002), Chapter 43. See also, the *Tsawwassen First Nation Final Agreement* online: <[https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/tsawwassen\\_first\\_nation\\_final\\_agreement\\_printed\\_in\\_2010.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/tsawwassen_first_nation_final_agreement_printed_in_2010.pdf)>.

<sup>78</sup> Miningfacts.org, “What are Impact and Benefit Agreements?” online: <[http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-\(IBAs\)/>](http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-(IBAs)/>)

emergency response. For example, under Chapter 13, paragraph 9 of the Tla'amin Final Agreement, the Tla'amin Nation may make laws applicable to Tla'amin lands with regards to environmental assessment and protection.<sup>79</sup> However, in the case of a conflict, the federal or provincial law prevails.<sup>80</sup>

Further, as custodians of the lands, Indigenous peoples' knowledge of the land is invaluable in making these arrangements as they constitute the group that would potentially be mostly affected by any changes that are proposed to be made by the project.

### **1.2.3. Power of Regulatory Bodies to Mandate the Approval of Affected Indigenous Peoples Prior to Approving Resource Development Projects**

Because of its fiduciary obligations to Indigenous peoples, government, through regulatory bodies, may require resource developers to enter agreements with Indigenous communities before commencing resource explorations on their lands.<sup>81</sup> Regulatory requirements are used by the government to compel project proponents to enter agreements with Indigenous communities where there is a strong claim to title. An example is the socio-economic agreement entered between BHP Billiton and the Government of the Northwest Territories in 1996 regarding the Ekati Diamond Mine.<sup>82</sup>

Although, these regulatory requirements do not expressly mandate that consent must be sought, they however require project proponents to address Indigenous environmental, social or

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<sup>79</sup> Tla'amin Final Agreement, Effective Date, April 5, 2016, online: [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/tla\\_1397237565325\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/tla_1397237565325_eng.pdf).

<sup>80</sup> *Ibid.*, Paragraph 12 at 160.

<sup>81</sup> *Ibid.*, at 140.

<sup>82</sup> Natural Resource Canada (NRC) website (archived page) for more information about the four IBAs signed with Aboriginal communities online: <http://www.nrcan.gc.ca/mining-materials/publications/aboriginal/bulletin/8822>. According to the NRC website, the Ekati mine is Canada's first underground and surface diamond mine. In 2013, BHP Billiton completed the sale of its interests in the Ekati mine to Diamond Dominion Corporation, thereby transferring its obligations under the IBA with Aboriginal groups to its new owner. <http://www.bhpbilliton.com/investors/news/bhp-billiton-completes-sale-of-diamonds-business-to-dominion-diamond-corporation>.

traditional concerns that can be reached via agreements as a precondition to granting government licenses, approvals or permits. On the part of project proponents, it makes it easier for them to obtain the requisite licenses and permits to commence work.

An example is the National Energy Board (NEB), *Filing Manual* 2015. According to Chapter 3.4.1 of the *Filing Manual* which makes provisions for the “Principles and Goals of the Consultation Program,” an overview of the company’s consultation philosophy should include “a copy of the Aboriginal consultation protocol, if established, along with any documented policies and principles for collecting traditional knowledge or traditional use information, if applicable.”<sup>83</sup> Further, Chapter 3.4.3 of the *Filing Manual* also provides that project proponents are required to demonstrate “those potentially affected by the project have been consulted and that any concerns raised have been considered and addressed as appropriate.”

In the decisions of *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*,<sup>84</sup> and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*,<sup>85</sup> the SCC held that the Crown always owes the duty to consult while regulatory processes can partially or completely fulfil this duty. In essence, the NEB as a regulatory body may, through its functions, ensure that Indigenous concerns are addressed, but they may or may not necessarily fulfil the duty to consult obligations of the government. However, these tribunals may in some instances require project proponents to demonstrate Indigenous approval as part of the process.

An example of how the government has intervened when parties fail to reach an agreement is by deferring the issuance of a permit pending the conclusion of an agreement between resource developers and First Nations; this occurred in British Columbia (B.C.) within the Tahltan territory. In 2015, the B.C. government bought back 61 coal licences from Fortune Mineral Ltd. and POSCO Canada Ltd. due to the inability of the mining company to reach an agreement with the First Nations in the territory.<sup>86</sup> Clearly, the government is able to intervene by suspending or

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<sup>83</sup> For further readings on the consultation and accommodation requirement of the NEB, see, the National Energy Board, *Filing Manual* (June 2015) < <https://www.neb-one.gc.ca/bts/ctr/gnnb/flngmnl/flngmnl-eng.pdf>>.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, (2017) SCC 41.

<sup>86</sup> Tom Fletcher, “B.C. buys out coal licences in Tahltan Territory” (Northern View: May 4, 2015) online: <<http://www.thenorthernview.com/business/302487281.html>>.

cancelling a project when both parties are unable to reach agreements or obtain Aboriginal support.

It is important to know that although, the NEB can direct project proponents to address issues prior to granting requisite licences and permits, the SCC nevertheless has held that the “substance of the duty does not change when a regulatory agency holds final decision-making authority in respect of a project.”<sup>87</sup> The NEB’s decision could be a reflection of the Crown’s exercise of the constitutional duty to consult but ultimately, the Crown has to ensure that affected Indigenous groups have been adequately consulted in accordance with the required level of consultation that was laid down in *Haida Nation*.

#### **1.2.4. The Requirement of Consent on Aboriginal Title Lands**

The 1997 Supreme Court of Canada decision in *Delgamuukw* laid the background for the landmark decision of *Tsilhqot’in Nation*. The significance of *Tsilhqot’in* decision to Canadian legal jurisprudence and Indigenous law is that for the first time, title to land was declared for the Tsilhqot’in people, with the implication of paving the way for other Indigenous land claimants to bring forth their claims of title to their traditional territories.

Indigenous title is a unique type of right in land because it differs from other types of land holding in Canada.<sup>88</sup> The SCC in the *Tsilhqot’in Nation* decision held that the rights conferred by Aboriginal title means that anyone seeking to use the land must obtain the consent of the Aboriginal title-holders.<sup>89</sup> Another important aspect of Aboriginal title with respect to resource development is that title owners cannot use, nor consent to the use of their land in a manner “that would substantially deprive future generations of the benefit of the land,”<sup>90</sup> although the courts

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<sup>87</sup> *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, (2017) SCC 40 at 1.

<sup>88</sup> *Delgamuukw*, supra note 16 at 114 where the Court held that what makes aboriginal title unique or “sui generis” is that “it arises from possession *before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward.”

<sup>89</sup> *Tsilhqot’in Nation*, supra note 3 at 76.

<sup>90</sup> *Delgamuukw*, supra note 16 at para 111. The Court held that this inherent limit to the use of the land makes it distinct from fee simple holding. See also, *Tsilhqot’in*, supra note 3 at para 74. Also, see *Sosa and Keenan supra*,

have said that “permanent changes may be possible.”<sup>91</sup> Further, the court left for future determination, the issue of whether certain types of resource development on the land, (such as exploitation of non-renewable natural resources), which is a form of permanent change to the land, can be said to be inconsistent with use of Aboriginal title lands. This is an area where even consent to the use of the land may not cure and could expose resource developers to future litigation. Thus, government might want to consider seeking the opinion of the Supreme Court of Canada by way of reference questions, before proceeding with such projects where title has been declared.

Also, the significance of *Tsilhqot'in Nation* to resource development in Canada lies not in the type of rights conferred upon Aboriginal title owners, as that was made clear in *Delgamuukw*, but in the scope and content of the right, which has been described to be similar to a fee simple right.<sup>92</sup> By virtue of their interest and rights in land, Indigenous title claimants have a stronger say. In addition to the rights conferred by Aboriginal title, some people, for example, Ron Tremblay, Grand Chief of the Wolastoq Grand Council, also believe that Canada's adoption of the UNDRIP would give his community a veto.<sup>93</sup> Resource developers are therefore, legally required to obtain consent prior to the commencement of projects on title lands.

### **1.2.5. Agreements reached with Indigenous Peoples by Third-parties**

In *Haida Nation*, the Court held that the Crown alone remains legally responsible to consult with Indigenous peoples, but that some procedural aspects of consultation could be delegated to

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note 29 at 3, where the authors write that the “inclusion of mineral ownership in Aboriginal title does not necessarily mean that First Nations may develop those resources.”

<sup>91</sup> *Tsilhqot'in Nation*, *supra* note 3 at 74

<sup>92</sup> *Ibid.*, at para 73.

<sup>93</sup> Julianne Hazlewood “UN Declaration will allow pipeline veto: N.B. Aboriginal leaders” CBC News, (May 11, 2016), online: <<http://www.cbc.ca/news/canada/new-brunswick/un-declaration-energy-east-pipeline-veto-1.3576710>>. See also, Paul Joffe “Veto” and Consent” – Significant Differences”, *supra* note 2 where he writes that in *Haida Nation*, *supra* note 6 at para 48 the Court used the term “veto” only with regards to how it is inapplicable to Aboriginal groups “pending final proof of claim” and clarifies that consent referred to in *Delgamuukw* is applicable to cases where title has been proved. Further, he said that “veto” is described as “an absolute power, with no balancing of rights.”

project proponents.<sup>94</sup> This means that even though the Crown cannot delegate its constitutional duty to consult, third parties wishing to do business on claimed title lands can still negotiate and enter into agreements with title claimants prior to proof of claim. This is irrespective of whether title has been established or not.<sup>95</sup> As such, where title is merely asserted and not yet established, it is highly recommended for project proponents to enter into agreements with Indigenous communities in order to avoid future litigation arising from breach of title rights. Corporations generally try to avoid litigation because it could take years or sometimes decades, to establish rights and obligations while the projects remain in limbo. Best practice will be to obtain Indigenous consent prior to the commencement of a project which could be in the form of an IBA. Because extensive consultation and negotiation usually occurs prior to entering into an IBA, it demonstrates that third-parties have consulted as required by the government in fulfilling its legal duty to consult.<sup>96</sup>

The issue of whether Indigenous communities are entitled to the recognition of yet unproven Aboriginal right came up before the court in *Saik'uz First Nation and Stelat'en First Nation v Alcan Inc.*<sup>97</sup> In this case, the Saik'uz and Stelat'en First Nations (the “Nechako Nation”) claimed private and public nuisance, as well as interference with their riparian rights based on their claim to title. However, the chambers judge struck out the claims and held that no reasonable cause of action exists until Aboriginal title and other Aboriginal rights were proven. On appeal, the British Columbia Court of Appeal held that it would be inconsistent with the principle of

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<sup>94</sup> *Haida Nation*, *supra* note 9 at para 25. The Court held that “the potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected.”

<sup>95</sup> *Taku River*, *supra* note 10 at para 25.

<sup>96</sup> Isaac & Knox, *supra* note 60 at 22. IBA's differ from project to project, because the impact on the affected community are not always the same. However, some basic components of an IBA would include labour provisions, economic development provisions, community provisions, environmental provisions, financial and commercial provisions. For more, see Ibironke T. Odumosu-Ayanu, “Indigenous Peoples, International Law, and Extractive Industry Contracts”, *supra* note 43. See also, Miningfacts.org, “What are Impact and Benefit Agreements?” online: <[http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-\(IBAs\)/>](http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-(IBAs)/>).

<sup>97</sup> *Saik'uz First Nation and Stelat'en First Nation v Rio Tinto Alcan Inc.*, 2015 BCCA 154, [2015] 3CNLR 263.

equality under the *Charter of Rights and Freedoms* to require the Nechako Nation to first obtain a court declaration for title, before they can maintain an action against another party.<sup>98</sup>

The significance of this case to obtaining prior consent is that following *Tsilhqot'in Nation*, the courts may be more willing to entertain claims to Indigenous title based on the recognition of for example, riparian and similar rights. In fact, the respondents advanced the argument that it will be “unprecedented to allow unrecognized Aboriginal right to ground a common law claim in tort”<sup>99</sup> but the court dismissed this argument, again relying on the principles of equality, and held that it would be unfair to require Aboriginal rights to be first “recognized” before allowing them to advance a claim.<sup>100</sup>

It therefore makes good business sense for resource developers to seek the consent of Indigenous communities affected by their projects when a title claim has been made. Also, the *Saik'uz* decision echoes the 2014 Report of the former Special Rapporteur on the Rights of Indigenous peoples, James Anaya. In this report, James Anaya expressed the view that “as a general rule, resource extraction should not occur on lands subject to aboriginal claims without adequate consultations with, and the free, prior and informed consent of the Indigenous peoples concerned.”<sup>101</sup>

### **1.2.6. The Need for Indigenous Approval when Contemplating Any Changes to Historic Treaties**

Treaty lands are lands where title has been granted to the Crown in exchange for rights over the lands, for instance, hunting, trapping and fishing rights. Treaties are solemn agreements that are entered into between the Crown and Indigenous peoples and aimed at encouraging peaceful

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<sup>98</sup> *Ibid.*, at paras 66-68.

<sup>99</sup> *Ibid.*, at para 69

<sup>100</sup> *Ibid.*,

<sup>101</sup> James Anaya, *The Situation of Indigenous Peoples in Canada: Report of the Special Rapporteur on the rights of Indigenous peoples*, submitted to the Human Rights Council, UN document A/HRC/27/52/Add.2, (July 4, 2014) at 22 online: < <http://unsr.jamesanaya.org/docs/countries/2014-report-canada-a-hrc-27-52-add-2-en.pdf>>.



relations between the parties.<sup>102</sup> These relations are described as diplomatic in nature, and the treaty negotiation process has a modern form in the context of comprehensive land claims agreements.<sup>103</sup> Historic treaties were made between 1701 and 1923, and they are located in nine provinces and three territories which amount to almost 50% of Canada's land mass.<sup>104</sup> Historic treaties are different from modern treaties in that they were mostly negotiated orally while modern treaties are more legally sophisticated and detailed. Modern treaties are also different from historic treaties because they deal with areas where Aboriginal rights had not previously been addressed. Modern treaties<sup>105</sup> have been briefly discussed in section 1.2.2 of this thesis.

The Crown owes a constitutional duty to consult with Indigenous treaty right holders prior to infringing on their treaty rights. This duty to consult has been held to exist even when there is a "taking up" clause under a treaty, and the Supreme Court decision in *Grassy Narrows First Nation v Ontario (Minister of Natural Resources)*<sup>106</sup> confirms that the right of the Crown to take up land under Treaty 3 is subject to the duty to consult with the Grassy Narrows First Nations' rights. Further, the Court held that the duty to consult under Treaty 3 is grounded in the honour of the Crown.<sup>107</sup> As such, if treaty lands are to be taken up for development, the nature of consultation required will depend on the strength of the claim of the Indigenous treaty signatories. By necessity, consultation could require accommodation of their rights and this could be by way of obtaining their approval (and/or consent) before such a project can proceed.<sup>108</sup>

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<sup>102</sup> *R. v Sioui*, [1990] 1 SCR 1025 at para 96 & 1044, [1990] 3 CNLR. 12, 70 DLR (4th) 42. See also, Indigenous and Northern Affairs Canada "Treaties with Aboriginal People in Canada" online: <<http://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292>>.

<sup>103</sup> *Ibid.*,

<sup>104</sup> *Ibid.*, Altogether, there are 70 recognized historic treaties namely, the Douglas Treaties (14); the Numbered Treaties (11); the Robinson Treaties (2); the Williams Treaties (2); the Upper Canada Land Surrenders (30); the Peace and Neutrality Treaties (3); and the Maritime Peace and Friendship Treaties (8).

<sup>105</sup> *Ibid.*,

<sup>106</sup> *Grassy Narrows First Nation v. Ontario (Minister of Natural Resources)* 2014 SCC 48, [2014] 2 SCR 447, 372 DLR. (4th) 385.

<sup>107</sup> *Ibid.*, at para 51.

<sup>108</sup> *Mikisew Cree 2005*, *supra* note 11 at para 54, where the court held that "consultation that excludes from the outset any form of accommodation would be meaningless." Consultation with treaty signatories should therefore

### **1.3. Proposed Legal Standard, (Consistent with International Standards) for Consent in Canada**

#### **1.3.1. Free, Prior and Informed Consent (FPIC) in Canada**

This research proposes FPIC as the proposed legal standard for consent in resource development in Canada and this will be discussed in detail under chapter three and four of this research work. Endorsed in 2010,<sup>109</sup> Canadian courts have been quite reluctant to embrace the full provisions of UNDRIP.<sup>110</sup> As such, some writers have come to believe that FPIC is a mere aspirational concept.<sup>111</sup> However, this research will show that where liberally and judiciously interpreted, it will be safe to conclude that the protections that section 35 of the Constitution affords Indigenous peoples can achieve the entrenchment of FPIC in Canadian laws.<sup>112</sup>

Some of the obstacles to domesticizing UNDRIP is that it appears to give too much prerogative power to Indigenous people as the requirement of FPIC appears too stringent. Further, FPIC removes some of the Crown's ability to infringe on Indigenous treaty rights, except in justifiable circumstances, while at the same time it places Indigenous peoples in a position that allows them to withhold their consent to resource developments on their lands.<sup>113</sup> This is because the doctrine of FPIC dictates that consent of Indigenous people must be sought and obtained. In essence, the Crown's duty to consult would translate to a duty to consult and to obtain Indigenous community approval in the form of consent.

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be with the aim of accommodating their interests, where necessary. Again, this could be by way of obtaining their consent to proceed with the project at hand.

<sup>109</sup> Indigenous and Northern Affairs Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", online: <<http://www.aadncaandc.gc.ca/eng/1309374239861/1309374546142>>.

<sup>110</sup> Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, *supra* note 5 at 146, where in discussing the effect of international law on Canadian domestic law, the author states that "it is highly unusual for parties to attempt to make arguments based on customary international law, partly because of the difficulties of proving its contents and partly because Canadian courts are simply not used to those arguments."

<sup>111</sup> Coates and Favel, *supra* note 6 at 14.

<sup>112</sup> For a fuller understanding of each word in the FPIC acronym, see Ginger Gibson MacDonald and Gaby Zezulka, "Understanding Successful Approaches to Free, Prior, and Informed Consent in Canada. Part 1: Recent Developments and Effective Roles for Government, Industry, and Indigenous Communities" (September 2015: Boreal Leadership Council) at 8, [MacDonald].

<sup>113</sup> *Tsilhqot'in Nation*, *supra* note 3, at 92.

In reality, Canadian jurisprudence is moving towards the subtle adoption of FPIC, especially when title to land has been declared, as can be seen in the case of *Tsilhqot'in Nation*. Also, Indigenous groups and organizations are beginning to promote FPIC principles through Band Council Resolutions and land use planning laws and policies.<sup>114</sup> However, more work needs to be done to ensure that the FPIC provisions under UNDRIP are adopted in Canada as the standard for obtaining consent, as opposed to stopping at the current legal requirement of consultations. In order to bring Canada up to speed with international requirement articulated under UNDRIP, Canada needs to set as a goal in consultation, the need to obtain Indigenous consent. Otherwise, any opposition to such major projects by Indigenous right and title-holders should be considered as a “No” to the project.

The implication of avoiding the existence of FPIC in Canadian natural resource industry can be costly to the government, project proponents and even affected Indigenous communities.<sup>115</sup> Likewise, the continued stance of the courts that the current law on the duty to consult does not give a “veto over what can be done with land pending final proof of a claim”<sup>116</sup> is bound to remain a thorny issue that stands between resource developers and Indigenous communities. It is suggested that resource developers should heed the hint aptly provided by the Supreme Court of Canada in the *Tsilhqot'in Nation* case. The court held that “governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Indigenous group.”<sup>117</sup>

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<sup>114</sup> Tsleil-Waututh Nation, Treaty, Lands and Resources Department, “Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal” online: <<https://twnsacredtrust.ca/wp-content/uploads/2015/05/TWNP-Assessment-Summary-11x17.pdf>>. The Tsleil-Waututh Nations have successfully implemented laws to be used in conducting environmental assessments on projects. This was successfully utilised in the case of the Kinder Morgan Trans Mountain Pipeline Expansion Project.

<sup>115</sup> Jamieson, *supra* note 39 at 56.

<sup>116</sup> *Long Plain First Nation v Canada (Attorney General)*, 2012 FC 1474 at para 68.

<sup>117</sup> *Tsilhqot'in Nation*, *supra* note 3 at para 97.

## 1.4. Conclusion

All over Canada, there is the continued demand for the recognition of Indigenous and treaty rights as recognized under international law. The duty to consult and accommodate as established in *Haida Nation* has been the spotlight for this new stage where Indigenous people require that their consent be sought and obtained prior to dealings on the lands. Realistically, not every consultation process will lead to Indigenous consent to a proposed project; hence, government may have to exercise its override powers under *Sparrow*. Such instance was recognized by the Court in the *Tzeachten First Nation* case where it was held that “at some point government decisions will have to be made.”<sup>118</sup>

It is proposed that the ultimate solution to achieving stability in resource development is to seek and obtain the free, prior and informed consent of the affected Indigenous communities to any large scale project that is likely to impact them. Also, government and third parties should be alert and alive to the needs of the community where a project is proposed to be built. Indigenous peoples want to decide how their lands would be used to generate wealth, and they want to participate in the enjoyment of the fruits their lands yield. Some of the land disputes attached to resource development are mainly peripheral to other issues that run deeper than those raised in most land claims disputes. It is suggested that, perhaps, if those other issues such as early involvement in consultation processes, resource revenue sharing and poverty alleviation measures are identified and addressed, it may be easier to obtain consent to resource development on Indigenous lands

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<sup>118</sup> *Tzeachten First Nation*, *supra* note 58 at para 72.

## CHAPTER 2

### 2. Aboriginal Title in Canada

Defined in its simplest form, Aboriginal title is “a right to the land itself.”<sup>119</sup> It allows Indigenous peoples an uninterrupted use and control of their lands. As a constitutional right, incursions would only be permitted if Indigenous consent is first sought and obtained. Failure to obtain Indigenous consent to the use of Aboriginal land could result in projects being cancelled or suspended, unless it is justified by a compelling and substantial public purpose in line with the Crown’s fiduciary obligations to the Aboriginal peoples of Canada.<sup>120</sup> This chapter will examine Aboriginal title in detail since this research discusses consent as it relates to Aboriginal title lands.

Indigenous peoples’ cultural beliefs are highly centred on, and connected to their lands and its components. They have names which reflect this connection and they consider themselves to be stewards of their land, and stewardship entails an ethical obligation to protect, manage and preserve resources on behalf of others. This ethical obligation explains the personal attachment that Indigenous people feel towards their traditional lands and the cultural strings that pull the connection even closer. However, the inherent limitations<sup>121</sup> over the use of title lands threatens this connection by dictating to title-holding communities, how their culture should evolve in order to retain a right to Aboriginal title, and what manner of use they may consent to or refuse to give their consent.<sup>122</sup> According to Dwight Newman, the uncertainties associated with the

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<sup>119</sup> *Delgamuukw*, *supra* note 16 at para 140.

<sup>120</sup> *Tsilhqot’in Nation*, *supra* note 3 at para 2.

<sup>121</sup> *Ibid.*, at 74. The inherent limitation discussed here means that Aboriginal land “cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it.”

<sup>122</sup> One of the ways in which Aboriginal title is different from a fee simple is that it has an internal limit, namely, that it cannot be used in a manner that will prevent future generations of the use of the land, (*Delgamuukw*, *supra* note 16 at para 124 and 154). *Tsilhqot’in Nation*, *supra* note 3 at para 94. See, also Kent McNeil, *Defining Aboriginal Title in the 90’s: Has the Supreme Court Finally Got It Right?* Presented at the Annual Robarts Lecture: 12<sup>th</sup> at York University (March 25, 1998) at 12. The writer said that the inherent limits of Aboriginal title is consistent with the responsibilities they have over their lands. He concludes at pages 12-14 that self-government is the solution to the inherent limitation problem that was placed on Aboriginal title in *Delgamuukw*, and that Indigenous peoples should be allowed to determine for themselves how they wish to preserve their culture.

scope of Aboriginal title could add more layers of uncertainties to third parties as well as, Aboriginal communities lacking the understanding of what they can do with their own land.<sup>123</sup>

It is easy to mistake Aboriginal title for fee simple title.<sup>124</sup> However, they are different in several ways. For instance, proprietary rights entail the right to permit interference on the good enjoyment and use of land, as well as, the right to exclude third parties from the land. However, for Indigenous peoples of Canada, their proprietary right is further entrenched in the constitution, and this makes it paramount above any provincial or federal laws.<sup>125</sup> This constitutional protection reflects the legal reasoning behind the obligation of Indigenous peoples to protect their lands for future generations. However, despite the constitutional protection of Aboriginal title, Indigenous peoples of Canada have had to litigate their rights to consent to use of land on their traditional territories. In the process, they have been subjected to tremendous hardship at the hands of third parties, including the government. Their plight through the decades was summarized by Peter H. Russell, when he describes Indigenous people as “the group of people living in a fourth world, under third world conditions but within first world countries.”<sup>126</sup>

This chapter explores the origin, nature and content of Aboriginal title in Canada before and after the *Tsilhqot'in Nation* decision, and this will set the stage for a broader discussion of the implication of this decision on Aboriginal title and resource development in chapter four. Despite the abundance of jurisprudence recognizing Aboriginal title as well as the provision of section 35(1) of the *Constitution Act, 1982*, Canada continues to resist Indigenous peoples' claim to title because of the fear that it confers ownership to Aboriginal title holders, often described as veto

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<sup>123</sup> Dwight Newman, “The Economic Characteristics of Indigenous Property Rights: A Canadian Case Study” (2016) *Nebraska Law Review*, Vol. 95. No 2 at 461.

<sup>124</sup> Fee Simple was described by Oosterhoff and Rayner as “the largest estate or interest known in law and is the most absolute in terms of the rights which it confers. It permits the owner to exercise every conceivable act of Ownership upon it or with respect to it. A.H. Oosterhoff & W.B. Rayner, eds., *Anger and Honsberger Law of Real Property*, 2d ed. (Aurora: Canada Law Book, 1985) at 98-99.

<sup>125</sup> Like most rights, Aboriginal rights is not absolute. These rights may be infringed if justifiable reasons are given by the government as laid out in the *Sparrow* test for infringement. For instance, federal regulations and public interest, and valid legislative purposes may be reasons to infringe on Aboriginal rights if the government is unable to find an alternative measure for protection.

<sup>126</sup> Peter H. Russell, *The Mabo Case and Indigenous Resistance to English-Settler Colonialism*, (University of Toronto Press: 2005) at 17.

power.<sup>127</sup> Initially, it was argued that the Crown's obligations toward Indigenous people were of a political character,<sup>128</sup> and this allowed the Crown to shirk its fiduciary role for several decades. However, it is widely believed that the *Calder* decision propelled the government into acknowledging Aboriginal rights and title enough to seek negotiation and consultation talks concerning developments on their lands.<sup>129</sup>

## 2.1 Origin of Aboriginal Title

Aboriginal title generally, can be traced to several sources. Firstly, it is recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. This constitutional protection sets it apart from other proprietary interests in land. Section 35(1) provides that "[t]he existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed." Therefore, it is important to note that the rights protected by this section are those rights that were in existence as of 1982 since it does not create or protect newly discovered rights.<sup>130</sup>

Prior to its affirmation under the Constitution, Aboriginal title was simply recognized as a right in land afforded to Aboriginal peoples of Canada. This was recognized by the Supreme Court in *Calder* when it held that prior to the arrival of European settlers, Indigenous peoples inhabited Canada, and they were organized in societies and occupied the land as their ancestors had done

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<sup>127</sup> *Haida Nation*, *supra* note 9 at paras 48-9, the Court held that even where an Aboriginal right or title has been established, it does not confer a veto power on the title holders, rather, what is expected is that the Crown balances all interests in a "give and take" manner through a process of accommodating Aboriginal interests in good faith. For more, see, Shin Imai, "Consult, Consent and Veto: International Norms and Canadian Treaties (Draft Chapter), (2016) Osgoode Legal Studies Research Paper No. 23 Vol. 12/Issue. 5/ at 12-3, online: <<http://ssrn.com/abstract=2726091>>.

<sup>128</sup> *R v Sparrow*, *supra* note 35 at para 2.

<sup>129</sup> In 1973, Canada issued a statement (the "1973 Claims Policy"), later followed by another claims policy issued in 1981, inviting First Nations that were pressed by demands for natural resources on their traditional territories to present their claims for quick and effective settlement so that development could offer them better lifestyles of their choice. Since then, government of Canada has signed 26 comprehensive land claims agreement ("LCA"), and there are currently about 100 LCA being negotiated all through the country. See, Indigenous and Northern Affairs Canada, "Comprehensive Claims" online: <<https://www.aadncaandc.gc.ca/eng/1100100030577/1100100030578>>. See also, *Taku River Tlingit First Nation v Canada*, (2016) YKSC 7, [2016] DLR (4<sup>th</sup>) 340 at 7-9.

<sup>130</sup> *Ibid.*, at 133; see also, *R v Sparrow*, *supra* note 35.

for centuries.<sup>131</sup> This reasoning appears logical and has been accepted as the correct source of Aboriginal title by the courts, while other theories such as the doctrine of terra nullius has been rejected as inapplicable to Canada.<sup>132</sup> In *Delgamuukw*, the Court stated that Aboriginal title “is based on the continued occupation and use of the land as part of the aboriginal peoples’ traditional way of life.”<sup>133</sup>

Further, Aboriginal title has also been traced to the Royal Proclamation of 1763. In *St. Catharines Milling & Lumber Co. v. R.*,<sup>134</sup> the Judicial Committee of the Privy Council traced the origin of Aboriginal title to the Royal Proclamation and held that Aboriginal possession “can only be ascribed to the general provisions of the Proclamation.”<sup>135</sup>

### 2.1.1. Nature and Content of Aboriginal Title

Aboriginal title is a distinct category of Aboriginal right that crystalized at the time that the Crown asserted sovereignty over Canada.<sup>136</sup> This cut-off date was arrived at because it is easier to determine the date of assertion than the time of first contact with Aboriginal people.<sup>137</sup> Generally, the underlying assumption is that the Crown holds a “pure legal estate, to which beneficial rights may or may not be attached.”<sup>138</sup>

Before the Supreme Court of Canada decision in *Calder*, Canadian governments refused to acknowledge the existence of Aboriginal title, while the Court hesitated in giving proper

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<sup>131</sup> *Calder v. Attorney General of British Columbia*, [1973] SCR 313; 34 DLR (3d) 145 at para 26 [*Calder*].

<sup>132</sup> *Tsilhqot’in Nation*, supra note 3 at para 69.

<sup>133</sup> *Delgamuukw* supra note 16 at para 190.

<sup>134</sup> *St. Catharines Milling & Lumber Co. v R.* (1889) L.R.14 App. Cas, 46.

<sup>135</sup> *Ibid.*, at 7. See also, *Calder*, supra note 131 at para 12.

<sup>136</sup> *Ibid.*, at 2.

<sup>137</sup> *Ibid.*, at 145. For further discussion on the threshold date, see Brian Slattery, “Some Thoughts on Aboriginal Title”, (1999) 48 U.N.B.L.J. 19 at 26. According to Slattery, the explanation for the “threshold date” is “ambiguous” because it is unclear whether it is the date when Crown first asserted sovereignty or rather, the date when it actually acquired sovereignty. Depending on how this is construed, the threshold date could be centuries apart because the date that Crown actually acquired sovereignty could be long after the date that it first asserted it.

<sup>138</sup> *Amodu Tijani v. Secretary of Southern Nigeria*, [1921] 2 A.C. 399 at pp 402-4.



definition to the content of Aboriginal title in Canada.<sup>139</sup> The definition of Aboriginal title by the judicial committee of the Privy Council in *St. Catharines Milling & Lumber Co. v R.* as “a personal and usufructuary right” to land<sup>140</sup> did not help in understanding the nature of Aboriginal title.

When *Calder* was decided in 1973, it officially established that Aboriginal title existed, and it gave Indigenous peoples the legal standing to go before the courts and claim title to particular lands.<sup>141</sup> *Calder* did not grant title to the Nisga’a claimants; rather, the SCC decided that “once Aboriginal title is established, it is presumed to continue until the contrary is proven.”<sup>142</sup> This decision is also very significant because in 1973, the federal government introduced a new comprehensive claims policy, thereby heralding the first modern comprehensive land claim agreement in Canada, namely, the James Bay and Northern Quebec Agreement of 1975.

This decision was followed by *Guerin v The Queen* which contextualized Aboriginal title within two aspects: its inalienable nature and the Crown’s fiduciary obligations to Indigenous peoples where land has been surrendered.<sup>143</sup> This *sui generis* nature of Aboriginal title means that it cannot be sold or transferred to third parties; rather, it must first be surrendered to the Crown.<sup>144</sup> In *Guerin*, the Court suggested that the reasoning behind the principle of inalienability can be traced to the common law principle that settlers in colonies must derive their title from the

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<sup>139</sup> For further discussion on the development of the content of Aboriginal title in Canada, see Kent McNeil, *Defining Aboriginal Title in the 90’s*, *supra* note 122 at 9.

<sup>140</sup> *St. Catharines*, *supra* note 134 at para 54

<sup>141</sup> *Sparrow*, *supra* note 35 at para 51. The Court stated that *Calder* decision made the federal government issue “a statement of policy” regarding Indian lands. The federal government’s decision had the effect of acknowledging the existence of Aboriginal title that they had denied for decades past. In fact, the statement showed the government’s willingness to negotiate treaties with Aboriginal leaders whereby compensation was offered to Aboriginal peoples where they can show that they had traditional interests in lands.

<sup>142</sup> *Calder*, *supra* note 131 at para 316.

<sup>143</sup> *Guerin v The Queen*, (1984) 2 SCR 335 at 382.

<sup>144</sup> *Ibid.*, at 112. See, also para 81, where the Supreme Court traced the source of the fiduciary relationship that exist between the Crown and Indigenous people to the Royal Proclamation of 1763, and held that it means that they must first surrender their lands to the Crown first before they can transfer it to third parties.

Crown and not from Indigenous inhabitants of the land. Another reason is to protect Indigenous peoples from being disposed of the lands by fraudulent purchasers.<sup>145</sup>

The decision in *Delgamuukw* brought legal precision as well as a clearer perspective to what Aboriginal title meant and how it can be proved. The SCC, while dismissing the argument that it was similar to a fee simple estate, acknowledged that Aboriginal title is not limited to the right to engage in specific activities on land; rather, it is a distinct legal entitlement that allows the title-holding community the ability to use land for varied purposes that is not limited to their practices, customs or traditions.<sup>146</sup> However, the SCC issued some restrictions on the use that Aboriginal title lands can be put to. One is that Aboriginal lands must not be used in a manner that makes it irreconcilable with the nature of the particular Aboriginal groups' culture. An analogy was drawn between this principle and the concept of equitable waste at common law. Simply described, equitable waste is an act of wanton or extravagant destruction that should not be committed on the land.<sup>147</sup>

After *Delgamuukw*, no other case has had a more resounding effect on Aboriginal title as the Supreme Court decision in *Tsilhqot'in Nation*. For the first time in Canadian history, the Court granted a declaration of Aboriginal title in land. Together with the decision in *Calder*, the *Delgamuukw* decision has informed several changes in existing government policies on consultation when dealing with Aboriginal title lands on the part of Indigenous peoples. In fact, it has been considered as "a victory for all First Nations."<sup>148</sup>

In the *Tsilhqot'in Nation* case, the Supreme Court confirmed most of its decision in *Delgamuukw* and stated that Aboriginal title flows from the sufficient, exclusive and continuous use of land by Indigenous claimants prior to the assertion of European sovereignty. However, the Court also provided more clarification to the meaning of "continuity" within this context and held that for

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<sup>145</sup> *Delgamuukw*, supra note 16 at 129. In *Guerin v R.*, supra note 143 at 96, the Court further held that the reason why land must first be surrendered to the Crown serves the purpose of interposing the Crown between Indigenous peoples, and therefore, protect them from exploitation from prospective purchasers.

<sup>146</sup> *Delgamuukw*, supra note 16 at 111 & 117.

<sup>147</sup> *Ibid.*, at 130.

<sup>148</sup> Statement of National Chief Perry Bellegarde, in "Assembly of First Nations National Chief Marks One Year Anniversary of "Historic" Supreme Court of Canada Tsilhqot'in Decision" at <<http://www.afn.ca/en/news-media/latest-news/06-26-15-assembly-of-first-nations-national-chief-marks-one-year-anniv>>.

Aboriginal title claimant to prove continuity, they need only show that the present occupation is grounded in pre-sovereign occupation.<sup>149</sup>

Further, Aboriginal title-holders have full discretion about the use and benefits of their land but they cannot use it in a manner that would deprive future generations of the benefit of the land. Most importantly, the consent of Indigenous title-holders is mandated before an incursion on their land would be permitted under the *Sparrow* test.<sup>150</sup>

### 2.1.2. Test for Aboriginal Title

In Canada, the court is required to take both common law and Aboriginal law perspectives in proof of title. This means that if, for instance, there is the need to prove occupation, the court is required to take the physical fact of occupation in common law, as well as prove that the Aboriginal group(s) have also occupied the land in dispute pre-sovereignty.<sup>151</sup>

The test for the proof of Aboriginal title was laid down in *Delgamuukw* and reaffirmed in *Tsilhqot'in Nation*.<sup>152</sup> The Court in *Tsilhqot'in Nation*, however, stated that there is a need to exercise caution prior to applying this test in order not to “distort Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts.”<sup>153</sup> Therefore, in order for an Aboriginal group to prove title to land, the following is required:

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<sup>149</sup> *Tsilhqot'in Nation*, *supra* note 3 at paras 25 & 47.

<sup>150</sup> *Ibid.*, at para 74.

<sup>151</sup> *Delgamuukw*, *supra* note 16 at 147.

<sup>152</sup> *Ibid.*, at paras 27 & 42, the Court held that the territorial approach to land was applicable, and it went on to distinguish between “site-specific” and “territorial” approach to proof of occupation of land. Essentially, the site-specific approach contemplates that title to land would be proved by showing title over small parts of land but with actively used neighbouring surroundings; while the territorial approach considers title to encompass large areas of land formerly used by their ancestors. However, the Court concluded that the most important consideration was to employ a culturally sensitive approach that would take into consideration factors such as regular use of territories for Aboriginal rights activities, for example, fishing, hunting, trapping and foraging. See also, *Brian Slaterry*, *supra* note 137 at 26, where the author stated that where an aboriginal group can provide proof of occupation but unable to accurately delineate its boundaries, recognition should be given to title alone, and boundary demarcations should be negotiated between the group and the government.

<sup>153</sup> *Ibid.*, at 32.

- i. The land must have been occupied prior to sovereignty;
- ii. Continuity of occupation between present and pre-sovereign occupation, if present occupation is relied on as proof of pre-sovereignty; and
- iii. Occupation must have been exclusive at sovereignty.<sup>154</sup>

## **I. Sufficient Pre-Sovereign Occupation**

One distinguishing factor between Aboriginal title and a fee simple is that Aboriginal groups must prove that they occupied the land prior to the arrival of the Europeans and the assertion of sovereignty by the Crown. The court held that Aboriginal practices, customs or traditions that developed as a result of contacts with the Europeans do not meet the standard for recognition of rights necessary in determining pre-sovereignty contact and thus, occupation.<sup>155</sup> Another difference between Aboriginal title and fee simple is that while the province has the fee simple jurisdiction, Aboriginal title confers jurisdiction as to how the land will be used.

To establish occupation, the court will consider common law and Aboriginal perspectives because Aboriginal litigants need to show that its group recognizes the title claimed, as well as show that they possessed and physically occupied the land.<sup>156</sup> In order to show that a group sufficiently occupied the land claimed, there must be physical evidence of occupation, such as regular use of the land claimed. The Aboriginal group must also chronicle its past use of the land in a manner that shows that they made it known to third parties that they used the land as their own.<sup>157</sup> However, lack of physical evidence alone is not enough for a decision-maker to conclude that sufficient occupation is not proved.

In *Tsilhqot'in Nation*, the Court stated that Aboriginal occupation of land need not be site-specific where the land is a large expanse of territory not yet cultivated; rather, territorial occupation of land proved by acts of occupation such as fishing, hunting and gathering is enough

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<sup>154</sup> *Delgamuukw*, supra note 16 at para 143.

<sup>155</sup> *Ibid.*, at 144.

<sup>156</sup> *Ibid.*, at 147.

<sup>157</sup> *Tsilhqot'in Nation*, supra note 3 at para 38.

to show occupation of that land.<sup>158</sup> However, a claim to title must evidence a “strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or under the exclusive stewardship of the claimant group.”<sup>159</sup> In essence, there is the need to consider several other factors such as manner of life of the claimants and the nature of land.

## **II. Continuous Occupation**

In *Delgamuukw*, the Court acknowledged that it could be difficult for Aboriginal title litigants to provide proof of pre-contact occupation of land claimed before the Crown asserted sovereignty. Also, this test does not require litigants to show an “unbroken chain of continuity” between their present and pre-sovereignty customs and practices.<sup>160</sup> In order to show continued occupation, it is sufficient if they can show evidence that they are presently occupying the land as proof that they had also occupied it before sovereignty.<sup>161</sup> In recognizing that injustice might be perpetuated if strict proof of occupation is required, the Court further held that it is possible that there could be a variation between pre-sovereignty occupation and present occupation.<sup>162</sup>

## **III. Exclusive Occupation at Sovereignty**

Exclusivity is a common law principle in proving title, and as such, Aboriginal perspectives should also be considered when proof of exclusive use of land is required<sup>163</sup> because exclusivity at common law differs from exclusive use of land within different Aboriginal communities. According to the Court in *Tsilhqot'in Nation*, common law perspective requires a consideration of possession and control while under Aboriginal test for exclusive use of land; one must take into consideration “the groups’ size, manner of life, material resources and technological

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<sup>158</sup> *Ibid.*, at 40.

<sup>159</sup> *Ibid.*, at 38

<sup>160</sup> *Ibid.*, at 46.

<sup>161</sup> *Ibid.*, at 152.

<sup>162</sup> *Ibid.*, at 154

<sup>163</sup> *Ibid.*, at 34.

abilities, and the character of the lands claimed.”<sup>164</sup> They must also show that they had the intention and numbered capacity to retain exclusive control of the lands in dispute.<sup>165</sup> The Court in *Tsilhqot’in Nation* further stated that “there must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.”<sup>166</sup>

Further, per Kent McNeil, a consideration of local conditions by the Court is a way of showing that one occupation depends on broader principles such as the underlying relationship of Aboriginal groups and their lands.<sup>167</sup> Under Aboriginal law, it is possible that an Aboriginal group could show exclusive use of land by showing that they consented to other groups’ use of their land as this would show control.<sup>168</sup>

### **2.1.3. Infringement of Aboriginal Title**

Although protected under section 35(1) of the Constitution, Aboriginal title is not an absolute right; therefore, it is subject to infringement by the Crown if justified under the *Sparrow* test. This test was confirmed in *Delgamuukw*, and slightly modified in the *Tsilhqot’in Nation* case where the Court stated that to justify an infringement of Aboriginal title, the government must show that:

1. It discharged its procedural duty to consult and accommodate;
2. Its actions were backed by a compelling and substantial objective; and
3. The governmental action is consistent with the Crown’s fiduciary obligation to the group.<sup>169</sup>

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<sup>164</sup> *Delgamuukw*, supra note 16 at para 149; *Tsilhqot’in Nation*, supra note 3 at 36.

<sup>165</sup> *Ibid.*, at 48.

<sup>166</sup> *Ibid.*, at 38.

<sup>167</sup> Kent McNeil, “Exclusive Occupation and Joint Aboriginal Title”, (2015) 48 U.B.C L. Rev 821 at 827, [McNeil, Exclusive Occupation and Joint Aboriginal Title].

<sup>168</sup> *Delgamuukw*, supra note 16 at para 156.

<sup>169</sup> *Tsilhqot’in Nation*, supra note 3 at 77.

In assessing whether the infringement is consistent with the Crown's fiduciary obligation, the following will be taken into consideration:

- a) Whether the process of resource allocation reflects the prior interest of Aboriginal title claimants;
- b) Whether there has been as little infringement as possible;
- c) Whether compensation was paid to the Aboriginal groups affected; and
- d) Whether the Aboriginal group were consulted.<sup>170</sup>

Relevant to the discussion of how an Aboriginal right will be justifiably infringed is the issue of which arm of government has the jurisdiction to infringe an Aboriginal right or title. Although the lands disputed in *Grassy Narrows First Nation v Ontario (Minister of Natural Resources)*, was in relations to treaty 3 lands, the Court having determined that Ontario had the power to take up lands in relation to matters that fall under sections 109, 92(a), and 92(c) of the *Constitution Act, 1867*, stated that the doctrine of interjurisdictional immunity does not preclude provinces from infringing treaty rights as long as it meets the justified infringement test laid down in *Sparrow*. This means that irrespective of which arm of government is contemplating an infringement of Aboriginal lands or treaty lands, the honour of the Crown is invoked and the Sparrow test would be applicable. To better appreciate the role of the Crown as a fiduciary towards Indigenous people, it would be useful to delve briefly into a discussion of the Crown-Aboriginal relationship in Canada, as well as, the constitutional mandate or duty to consult with Aboriginal peoples prior to a contemplated infringement of right or title.

## **2.2. Aboriginal Title after *Tsilhqot'in Nation*, and the Role of Consent in Reconciliation**

Since the decision in *Tsilhqot'in Nation*, it has become inescapably necessary for adequate provisions to be made to usher in a new era of seeking and obtaining Aboriginal consent prior to

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<sup>170</sup> Delgamuukw, *supra* note 16 at para 160-162. See also *Tsilhqot'in Nation* *supra* note 3 at para 77.

a Crown-contemplated action on Aboriginal title. In *Taku River*, the Court stated that while waiting for settlement to occur, the honour of the Crown requires a just balancing of societal and Aboriginal interest, which in turn, facilitates reconciliation of Aboriginal and Crown sovereignty.<sup>171</sup> As a means of reconciling Crown-Aboriginal sovereignties, consultation is likely to fail where even after engaging in good faith consultations, both parties fail to reach a consensus.<sup>172</sup> Also, a strait-jacket approach to consultation is bound to fail to address the current legal regime heralded by *Tsilhqot'in Nation* decision largely because it is impossible for the law to make provisions for all cases due to the diversity within Aboriginal groups and communities.

Although consultation ensures fair dealings with Aboriginal people and allows the Crown to fulfil its fiduciary duty, consultation is not designed to mandate that consent must be the outcome. According to the Court in *Haida Nation*, consultation allows the Crown to adjust its policies by accommodating Aboriginal interest.<sup>173</sup> It was not designed as a medium through which Indigenous people could come to the negotiating table with the goal of dictating the outcome of a process by use of a veto power. For this reason alone, it is argued that consultation fails to address the substantive issues of consent requirement raised by Aboriginal groups in relations to a claimed territory.<sup>174</sup> Indeed, what is now required is an adoption of the FPIC provisions or enactment of domestic laws, that will guide the Crown when dealing with Aboriginal title lands. Until the place of consent is fully honoured in Crown dealings on Aboriginal title, the issue of sufficiency or lack of consultation will continue to come before the courts for adjudication.

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<sup>171</sup> *Taku River*, *supra* note 10 at para 42. In *Delgamuukw*, *supra* note 16, the Court held that most legislative objectives that justify an infringement can be traced to the Crown's reconciliation goal. At the same time, Aboriginal perspectives must be taken into consideration. It is suggested that reconciliation steps should consider Indigenous peoples' culture and traditions through negotiated consent.

<sup>172</sup> Michael Coyle, "From Consultation to Consent: Squaring the Circles?" [2016] 67 U.N.B.L.J 235 at 238 [Coyle].

<sup>173</sup> *Haida Nation*, *supra* note 9 at 49.

<sup>174</sup> *Tsilhqot'in Nation* *supra* note 3, at para 93. See also Coyle, *supra* note 172 at 265-6 for more discussion on the role of consultation within consent. The author writes that even in situations where consent is not required prior to commencing development on Aboriginal lands, what is expected of the Crown is to engage in high-level consultations with a view to not just reaching, but *seeking* an agreement. What this suggests is that in such cases, it is insufficient to show that the Crown accommodated the concerns voiced by the Indigenous groups; rather, it will be preferable for Aboriginal concerns to be discussed and addressed. See also, *Haida Nation*, *supra* note 9 at para 47.



UNDRIP provides a platform in which Canadian domestic laws can ensure that its existing consultation regimes are consistent with emerging international legal standards on consent in relation to Aboriginal title lands. UNDRIP's concept for consent namely, FPIC, is clear regarding state obligations in dealing with Indigenous traditional territories.

FPIC is described as the voluntarily given consent (absent of coercion, intimidation or manipulation) of an Indigenous community to a proposed project whereby information regarding the nature of the project is provided in advance to the collective decision makers of the right-holding members of the affected community. In essence, it requires the government to seek Indigenous people's consent prior to commencement of any projects affecting their lands.<sup>175</sup>

In *Dene Tha' First Nation v Canada (Minister of Environment)*,<sup>176</sup> the Court held that "[c]onsultation is not consultation absent the intent to consult."<sup>177</sup> If the Canadian government is serious about fulfilling reconciliatory objectives of section 35, consultation should begin with the outlook that an agreement is sought to be reached. Where there is a strong claim to title, reaching consensus should be the objective of negotiating parties from the outset. It will be a meaningless effort when parties have a mandate to obtain Indigenous consent only to have a mind-set of consultation from the outset. Where title has been declared, consultation alone will not suffice. What is required is the consent of Aboriginal title holders because they have the legal right to use and possess the land in a manner consistent with their rights. The Crown may only override this right upon satisfying that there is a compelling and substantial public purpose and, that it is consistent with its fiduciary obligations to Indigenous peoples.<sup>178</sup>

Existing jurisprudence on consultation processes nation-wide continues to evolve throughout the courts similar to how the constitutional dialogue relationship operates between the Supreme Court and legislative bodies. The constitutional dialogue relationship between the court and

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<sup>175</sup> See UN-REDD (Reducing Emissions from Deforestation and Forest Degradation) Program "Guidelines on Free, Prior and Informed Consent (January 2013) at 18-20 online: <<http://www.unclearn.org/sites/default/files/inventory/un-redd05.pdf>>. See also, The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Resolution 61/295 adopted by the General Assembly, 61st Session, Supplement No. 49 (September 13, 2007).

<sup>176</sup> *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354; [2006] F.C.J. No. 1677.

<sup>177</sup> *Ibid.*, at 113

<sup>178</sup> *Tsilhqot'in Nation*, supra note 3 at para 42.

legislative bodies described here reflects how the government responds to decisions emanating from the courts. For example, when the Supreme Court struck down existing jurisprudence on Aboriginal title and confirmed the existence of Aboriginal title in *Calder*, federal and provincial governments responded by inviting Aboriginal title claimants to treaty-negotiating tables. Also, in *Tsilhqot'in Nation*, the government responded by showing more commitment to some of the provisions of UNDRIP. The law is still evolving regarding how UNDRIP provisions will be domesticized as this may involve an overhaul to existing consultation laws.<sup>179</sup>

Often, when a pronouncement is made regarding insufficiency or lack of consultation by the Crown, consultation policies are amended to ensure that it is consistent with case law. The implication of *Tsilhqot'in Nation* decision to Canadian consultation regime is that it shows the shortcomings of existing consultation regimes and Indigenous peoples' demand for their right to give consent to developments was significantly renewed. It also categorically spells out the extent of legal issues that could arise where after the Crown has justifiably infringed on a title land, an Aboriginal group becomes successful in proving title to land. According to the Court, once title is established, the Crown may be required to review its previous decisions and this may lead to cancellation and delays of projects.<sup>180</sup>

### **2.2.1. Extinguishment of Aboriginal Title**

Prior to 1982, the provinces of Canada had no jurisdiction to extinguish Aboriginal title due to the provisions of section 91 of the *Constitution Act, 1867*, which confers matters arising from Indians, and lands reserved for the Indians unto the exclusive legislative authority of the Parliament.<sup>181</sup> Although provincial laws of general application applied to Indigenous, and lands

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<sup>179</sup> Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps, the Charter of Rights Isn't Such a Bad Thing after All)" *Osgoode Hall Law Journal* 35.1 (1997) 75-124 at 79-81, online: <<http://digitalcommons.osgoode.yorku.ca/ohlj/vol35/iss1/2>>.

<sup>180</sup> *Tsilhqot'in Nation*, supra note 3 at para 92.

<sup>181</sup> Section 91(24) of the *Constitution Act, (1867)* 30 & 31 Victoria, c 3 (U.K); see also *Delgamuukw*, supra note 16 at 174-8, where the Court made reference to the judgement of Lord Watson in *St. Catharine's Milling* case and held that the implication of section 91(24) is also to leave the exclusive jurisdiction to extinguish Aboriginal title and reserve lands on the federal government.

reserved for Indigenous peoples, provincial laws could not extinguish Aboriginal rights.<sup>182</sup> Also, before 1982, the only means of extinguishing Aboriginal title was by voluntary surrender or by a unilateral legislation.<sup>183</sup> However, since 1982, the only means of extinguishing Aboriginal title is by surrender to the Crown through a treaty or land claims agreement, and by the infringement test laid down in *Sparrow*. In the absence of a voluntary surrender or a justified infringement by the Crown, the Crown cannot extinguish an Aboriginal right or title.

In terms of proof, the burden of proof of Aboriginal title shifts from one party to another depending on the issue claimed. Where there is a claim of title, the burden rests on the party asserting title, which is often an Indigenous group. Once established, the onus of proof that an Aboriginal title has been extinguished shifts to the party opposing its existence.<sup>184</sup> According to the Privy Council decision of *Amodu Tijani*, a party claiming that Aboriginal title has been extinguished must make it “clear and plain,” failing which it is presumed to still exist.<sup>185</sup>

## 2.3. Conclusion

In addition to the meaning, nature and contents of Aboriginal title, this chapter has traced the historical background and evolution of Aboriginal title in Canada. It also recounts the jurisprudential developments that culminate into the current understanding of Indigenous title, including the legal test to establish the title. The extenuating circumstances where infringement of Aboriginal title is justifiable as well as events that constitute extinguishment of the title were also discussed. These, all together, set the stage for our next discussion on the duty to consult and the role of Indigenous consent in resource development in chapters three and four.

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<sup>182</sup> In *Delgamuukw*, *supra* note 16 at paras 180-1, the Court held that provincial laws of general application (PLGA) could not extinguish Aboriginal title because they do not meet the standard laid down in *Sparrow* for extinguishment. Further, PLGA is inapplicable because of the operation of the doctrine of interjurisdictional immunity.

<sup>183</sup> For further readings on extinguishment by unilateral legislation, see Robert Hamilton, “After Tsilhqot’in Nation: The Aboriginal Title Question in Canada’s Maritime Provinces [2016] 67 U.N.B.L.J. 58 at 84. See, also *R v Van der Peet*, (1996) 2 SCR. 507 at 125 and *R v Marshall*; *R v Bernard*, [2005] SCC 43 at 39; [2005] 2 SCR 220.

<sup>184</sup> Brian Slattey, *supra* note 137 at 32. See also, Kent McNeil, “The Onus of Proof of Aboriginal Title” (1999), *Osgoode Hall Law Journal* 37.4: 775-803.

<sup>185</sup> *Amodu Tijani*, *supra* note 138 at 409-10; quoted in *Calder*, *supra* note 131 at para 149.

In essence, the requirement that both Aboriginal and common law perspective must be considered in proof of title informs the interpretation of section 35 and the reconciliation goal of Canada. However, if reconciliation is to be achieved, it is argued that a keen consideration of Aboriginal perspectives should be the focus through which the government should direct its policies when a major development is contemplated on Indigenous territories. Undoubtedly, consultation is an excellent process that has served in building Crown-Aboriginal relationships. However, obtaining the approval of Aboriginal title claimants by way of consent is a more assured means that allows the Crown to fulfill its constitutional mandate to its Indigenous citizens.

## Chapter 3

### 3. The Duty to Consult, and where Necessary, Accommodate on Claimed Title Lands

Section 35(1) of the Constitution, as well as the decision in *Guerin* opened a new legal topic of national importance between the existing relationship between the Crown and Indigenous peoples. Prior to the SCC decision in *Guerin*, the Courts had generally characterized the relationship between the Crown and Indigenous peoples as a “*political trust*” or “*trust in the higher sense*.”<sup>186</sup> However, in *Guerin*, the Court stated that the Crown’s obligation towards Indigenous people is unique or *sui generis*, but fiduciary in nature, and a breach of this duty is akin to a breach of trust relationship.<sup>187</sup>

Because of the sacred and political nature of the relationship, and the dual role that the Crown occupies between Indigenous and non-Indigenous Canadians,<sup>188</sup> this right and correlative duty is fully protected under section 35 of the *Constitution Act*, 1982, case law, and by other federal and provincial instruments. As a result of the Crown’s fiduciary role, the honour of the Crown is always at stake when dealing with Indigenous people. The doctrine of duty to consult therefore arises from the Crown’s legal obligation to deal honourably with Indigenous people, and where necessary, accommodate their interests.<sup>189</sup>

For all levels of government to fully understand Indigenous concerns over proposed project developments on their traditional territories, they must fully engage in consultation with the title claimants, and where necessary, accommodate their interests. This means that the Crown must understand its consultation obligations to fully discharge its legal duties. When the duty to consult was first espoused in *Sparrow*, the Court was primarily concerned with laying out the conditions upon which the Crown could violate an Aboriginal or treaty right. However, the duty to consult

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<sup>186</sup>James I. Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples*, (Saskatoon: Purich Publishing Ltd., 2005) at 22.

<sup>187</sup>*Guerin*, *supra* note 143 at para 79.

<sup>188</sup>*Osoyoos Indian Band v. Oliver [Town]*, [2001] SCC 85 at 53, 2001 CSC 85, [2001] 3 SCR 746. The Court held that the Crown is not a fiduciary when exercising its public duty to expropriate lands to fulfil a public interest, and its fiduciary duty to Indigenous people. Its fiduciary duty only emerges again after it has decided to expropriate lands.

<sup>189</sup>*Haida Nation*, *supra* note 9 at paras 16-24.

has fully evolved. For example, in *Tsilhqot'in Nation*, the Crown is now mandated to consider its duty to consult with Indigenous title-holders when justifying an infringement.

The source of the modern duty to consult is grounded in the honour of the Crown, and according to the Court in *R v Badger*,<sup>190</sup> “the honour of the Crown is always at stake in its dealing with Indian people.”<sup>191</sup> Other recognized sources are the *Royal Proclamation of 1763*, and the reconciliation objective of Canada’s history with Aboriginal peoples.<sup>192</sup> Appearing first in *Sparrow*, the Court recognized the government’s duty to consult with Indigenous peoples while justifying an infringement of a section 35 right. It was later traced and expanded in *Delgamuukw*, stating that the purpose of the duty to consult is the reconciliation of Crown-Indigenous societies.<sup>193</sup> It was in the 2004/2005 trilogy decisions in *Haida Nation*; *Taku River*; and *Mikisew Cree*, that the duty to consult doctrine was fully fleshed out.

### **3.1. Jurisprudential Analysis of the Duty to Consult**

The decision in *Haida Nation* is perhaps, the most instructive when it comes to understanding the depth and breadth of the Crown’s duty to consult, and where appropriate, accommodate Indigenous peoples. To summarize the facts of the case, the Haida people of Haida Gwaii in British Columbia brought legal action against the Province for approving the transfer of Tree Farm Licences (TFL) to Weyerhaeuser Company Limited (“Weyerhaeuser”) in 1999 without their consent. The main issue the Court was called to decide was whether or not the government was required to consult with the Haida claimants prior to making the decision to harvest the forests; and to accommodate their concerns prior to proof of title to Haida Gwaii lands.<sup>194</sup>

In *Haida Nation*, the Court made several crucial delineations on the duty to consult doctrine which in turn has set the stage for consultation standards for both federal and provincial

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<sup>190</sup> *R v Badger*, 1996 1SCR 771, SCJ No. 39; 2CNLR 77.

<sup>191</sup> *Ibid.*, at 41.

<sup>192</sup> *Canada (Governor in Council) v Mikisew Cree First Nation*, 2016 FCA 311 at para 41 [*Canada v Mikisew Cree FN* (2016)]. In *Dene Tha’ First Nation*, *supra* note 176 at para 82, reconciliation of the pre-existence of Aboriginal peoples with the present and future sovereignty of the Crown was stated to be the goal of consultation.

<sup>193</sup> *Delgamuukw*, *supra* note 16 at para 186.

<sup>194</sup> *Haida Nation*, *supra* note 9 at paras 1-6.

government. Firstly, the Court held that the government of British Columbia had a legal duty to consult with the Haida people regarding its decisions to harvest the forests as well as to transfer the TFL. According to the Court, as a result of engaging in “good-faith” consultation, the need to accommodate Indigenous interests and concerns may be revealed.<sup>195</sup> This led to a discussion of how much consultation is good enough, and when it should lead to consent. From the decision in *Haida Nation*, what is clear is that in British Columbia, where several land title claims are making their way to negotiation tables because treaties are yet to be concluded or because negotiation of treaties was never initiated, the honour of the Crown would require that government engage in deep consultations that would lead to “just settlement of Aboriginal claims.”<sup>196</sup>

### 3.1.1. The Trigger for Consultation

In *Haida Nation*, the Court provided answers to when the duty to consult is triggered and stated that title-claimants do not have to wait until proof is established to be entitled to consultation and accommodation of their rights. All that is needed to trigger consultation duties regarding Aboriginal rights and title is threefold: (1) that the Crown should have real or constructive knowledge of those rights or title;<sup>197</sup> (2) that the Crown is contemplating a project on Aboriginal land; and (3) that the contemplated project may adversely affect Aboriginal claim or right on the land.<sup>198</sup>

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<sup>195</sup> *Ibid.*, at 10.

<sup>196</sup> *Ibid.*, at 20. A caveat is issued in para 27 regarding the duties of the Crown when engaged in treaty negotiations. The Court sounded this warning again in *Tsilhqot'in Nation*, especially when there is a strong claim to title, and stated that while in the process of negotiating treaties, the Crown may have to accommodate the interests of the title claimants so as to preserve their interests and not render their concerns moot.

<sup>197</sup> Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, *supra* note 5 at 39. The author said that when the Crown has constructive knowledge of an action that may be in breach of an Aboriginal right, the knowledge element is met; and at page 48, that real or constructive knowledge does not include a reorganization of governance structure since this is dependent on what the new governance structure chooses to do.

<sup>198</sup> *Haida Nation*, *supra* note 9 at 36.

What does real or constructive knowledge imply? The court in *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*<sup>199</sup> was tasked with deciding this issue and explaining the preconditions to trigger the duty to consult. In this case, the Hupacasath First Nation sought a declaration that Canada is required to engage in a process of consultation and accommodation with them prior to taking steps that would bind Canada under an international agreement with China. They argued that the agreement between both countries inhibits Canada's ability or willingness to take steps to regulate or prevent a breach in their rights from the use of lands and resources by Chinese investors. At the root of this allegation is the speculation that Canada will not want to incur an adverse monetary award and as such, it would likely avoid taking action barred by the agreement that would prevent infringements of Aboriginal rights. The Court held that the argument made by the claimants were, “pure guesswork”, and that the duty to consult is triggered not by imagination but with facts supported by evidence.<sup>200</sup> Where a conduct is likely to adversely impact an Aboriginal right, the courts have held that government cannot dodge its constitutional duty to consult because title to land has not been established. Perhaps, one aspect of the duty to consult doctrine that is most referred to in *Haida Nation* is the area of recognizing the depth of consultation duties that is required of the Crown in each case.

Several issues could emerge when determining the scope of the constitutional requirement of consultation when title to land is yet unproven, and one can appreciate the dilemma that the government faces when determining whether or not each case presented deserves the high-spectrum consultation leading to consent or a low/middle-spectrum consultation that merely requires that concerns are aired and accommodations are discussed and implemented.<sup>201</sup> The Court in *Haida Nation* however, states that this can be determined depending on the circumstances or the preliminary assessment of the strength of the rights of title claimants. Using the analogy of a spectrum, the Court fashions a sort of road-map that the government may follow in determining how to fulfil its constitutional duty to consult.

The spectrum analogy envisages that when Indigenous claim to title is weak, their rights are limited and government is unlikely to infringe on their rights. In this situation, the Court stated

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<sup>199</sup> *Hupacasath First Nation v Canada (Minister of Foreign Affairs)* 2015 CAF 4, [2015] FCA 4, [2015] 2 C.N.L.R. 200.

<sup>200</sup> *Ibid.*, at 91.

<sup>201</sup> *Haida Nation*, *supra* note 9 at 43-45.



that very little is required from the Crown, such as, to provide notices, information and discuss issues.<sup>202</sup> On the other hand, the other end of the spectrum envisages that when a strong title claim exists, deep consultation is demanded. A middle ground level of consultation also exists where the Crown must analyze on a case by case basis, the level of consultation that is most appropriate. In all three identified levels, the government may be required to accommodate Indigenous interests

The problem with the “weak-level spectrum” analogy is that it does not conform to required standards of consultation and consent obligations of the government under international Indigenous rights instruments, which would be discussed later in this chapter. The fact is that Indigenous peoples have existing legal structures which should not be ignored. Government actions on Indigenous lands that are made without deferring to Indigenous laws disregard those laws as valid; however, non-application of a law does not make it invalid, and if continually ignored, the section 35 reconciliation goal would likely remain aspirational.

Significantly, the decision in *Haida Nation* recognizes the need to accommodate Indigenous rights and interests in land. Also, the Court in *Taku River* stated that only through consultation with right holders/claimants can concerns regarding a contemplated project on claimed territories be revealed. In *Taku River*, the Court dismissed the Province common law duty of fair dealing as an “impoverished vision of the honour of the Crown and all that it implies” stating that the duty arises even prior to proof of asserted Aboriginal rights and title.<sup>203</sup> This pronouncement is highly instructive if the government wishes to promote and ensure stability in resource development on Indigenous lands. For one reason, it manifests that even prior to proof of title, Indigenous title claimants have constitutional rights to be heard irrespective of whether or not the title claimed can be proved. In practice, this is similar to the role that the tests for interlocutory injunctions play in litigation.

Accommodation of interests becomes even more imperative in unproven title cases where “irreparable harm” could occur if the Indigenous concerns are not addressed. According to the

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<sup>202</sup> *Ibid.*, at 43-44.

<sup>203</sup> *Taku River*, *supra* note 10 at para 24.

SCC decision in *RJR – MacDonald Inc. v. Canada (Attorney General)*,<sup>204</sup> irreparable harm refers to “harm which cannot be quantified in monetary terms or which cannot be cured.”<sup>205</sup> For example, if a contemplated pipeline project necessitates the building of pipelines along a route where salmons usually breed, it would, as a result of oil contamination and oxygen depletion, reduce the survival of salmon embryos and even adult salmons would suffocate.<sup>206</sup> In such a situation, the government is constitutionally bound to take steps to preserve the group’s interest by accommodating their concerns; otherwise, it would have to justify any decisions made pursuant to its override powers in *Sparrow*. Also, should the pipeline project be approved, the government would have to justify the infringement of the Aboriginal right to fish. However, prior to justifying such, the government is bound to consider whether or not their right to fish for salmon at that location would be affected and if this would deny the right holders of the right to their preferred means of exercising that right.<sup>207</sup>

The importance of preserving Indigenous rights through consultation and accommodation was further discussed in *Taku River* where the Court stated that the government may have to change its plans or policy in order to accommodate Indigenous concerns. According to the Court, Indigenous claimants should not have to prove their rights before government would consult with them, and thereafter, make a determination as to whether or not an infringement of such right would be justified when their concerns are not accommodated. Similarly, in *Dene Tha’ First Nation v Canada (Minister of Environment)*, Justice Phelan stated that when a conduct is contemplated by the government, the duty to consult is triggered at the stage when regulatory and environmental review processes related to the project is being created.<sup>208</sup> Failing which,

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<sup>204</sup> *RJR – MacDonald Inc. v. Canada (Attorney General)*, 1994 1SCR 311; 111 DLR (4<sup>th</sup>) 385; SCJ No. 17.

<sup>205</sup> *Ibid.*, at 64.

<sup>206</sup> For more readings on the threats that pipeline projects have on salmons in British Columbia. See Rainforest Conservation Foundation “Why salmon in British Columbia are threatened by the proposed Enbridge Northern Gateway Pipeline Project”, (2011), online: <<http://raincoast.org/wp-content/uploads/Risk-to-salmon-by-the-proposed-Northern-GatewayProject.pdf>>.

<sup>207</sup> *R v Sparrow*, *supra* note 35, at para.

<sup>208</sup> *Dene Tha’*, *supra* note 176 at 100, where the Court held that the Government cannot avoid consulting with affected Indigenous communities because its contemplated conduct is “conceptual in nature” or because it is still in blue print. According to the Court, regulatory mechanisms are not “some glimmer of an idea gestating in the head of a government employee that had to be further refined before it could be exposed to the public.” See also, *Hupacasath First Nation*, *supra* note 19, where the Court held that Canada did not have to consult with the

irreparable harm could be done, loss of faith in the consultation process could occur, and ultimately, the Crown's role in the reconciliation process would be avoided.<sup>209</sup>

### 3.2. Consent Obligations within the Scope of the Duty to Consult

Preservation of land and resources is one of the most important issues that many Indigenous communities nationwide have struggled to achieve. For example, the Haudenosaunee or people of the longhouse, made up of the Six Nations of Mohawk, Oneida, Onondaga, Cayuga, Seneca and (in 1722), the Tuscarora, also called the Iroquois Confederacy, are united by the Great Law of Peace.<sup>210</sup> Members of the Confederacy are raised to see themselves as stewards of their traditional territories, and they have the obligation to protect their environment for others up to the next seven generations.<sup>211</sup> In fact, they are taught to live in such a manner that when they are gone, it would be as if they never used the land.<sup>212</sup> This becomes impossible to achieve when

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Hupacasath FN before entering into foreign investment agreement with China. See further, *Huu-Ay-Aht First Nation v British Columbia (Minister of Forests)* 2005 BCSC 679, [2005] 3CNLR 74 where the Court held that it was not restricted to the exercise of statutory powers.

<sup>209</sup> *Taku River*, *supra* note 10 at para 25. Loss of faith in consultation processes has been judicially noticed in several cases including the *Mikisew Crew*, *supra* note 11 at para 1. Indeed, it is apparent that loss of faith or trust in consultation on the part of Indigenous peoples is justified based on their past experiences. Very little success would be recorded if at the outset of entering into negotiations, a party feels automatically disadvantaged. At para 54, the Court went on to state that "consultation that excludes from the outset any form of accommodation would be meaningless." Therefore, consultation should not just be a process; it should be a means of achieving the result of consensus seeking. One important element necessary to obtain consent is to have authorised negotiators who can make binding decisions on behalf of the government or group.

See Harry Swain, "Paths to reconciliation in the post-Tsilhqot'in world", (2016), 58 Canadian Business Law Journal 3 at 7-8 [Swain, "Paths to reconciliation in the post-Tsilhqot'in world"]. As a former deputy minister of Indian and Northern Affairs, he recognized the need to have authorised decision-makers at the negotiation tables as a means of building trust and fostering Crown-Indigenous relations. He stated that government would need to appoint negotiators who can hear the pleas of First Nations regarding land ownership and that government "simply must get away from the practice of sending scared junior officials into the field with insanely detailed take-it-or-leave-it language and a sense that they are there to protect obsolete federal policy positions."

<sup>210</sup> Peter G. Ramsden, "Haudenosaunee Iroquois" *HistoricaBritanica*, December 14, 2006, online: <<http://www.thecanadianencyclopedia.ca/en/article/iroquois/>>.

<sup>211</sup> David Bedford and W. Thom Workman, "Whiteness and the Great Law of Peace" in Cynthia Levine-Rasky, ed. *Working through Whiteness: International Perspectives*, (New York: Suny Press, 2002) at 32 [Bedford and Workman].

<sup>212</sup> *Ibid.*

resource development takes place on their traditional territories because often, modern and western attitude to resource development is radically different from Indigenous spiritual views to nature and land.

Generally, no climate can attain stability when there is a reliance on government's ability to override consent whenever a deadlock is reached. As such, it will be easier for project proponents to comply with Indigenous consent models and devise government policies to reflect these models. In practice, these are the roles played by regulatory bodies, but it has become increasingly important to situate some of these monitoring roles within Indigenous decision-makers, and these are examples of what accommodation can achieve.

The SCC decision in *Tsilhqot'in* is clear that with establishment of title to land by a court declaration or agreement, title-holders have "the right to determine, subject to the inherent limits of group title, held for future generations, the uses to which the land is put and to enjoy its economic fruits."<sup>213</sup> In essence, government and third parties who wish to have dealings on Aboriginal title lands must first seek and obtain their consent prior to development on the land and nothing less would suffice.

In effect, where a Crown-contemplated project is at the hatching stage, Indigenous title-holders would have the right to consent or withhold their consent from such project within the scope of consultation. Where their consent is withheld, the project can only see the light of day if the Crown can justify its actions under section 35 of the Constitution and there are a handful of reasons why this may not be the best recourse for the government. For example, where the court decides that an accommodation of rights exists and that the infringement is not justified, it could overturn or cancel the decision to operate, and award damages, injunctive reliefs and consultation and accommodation orders against the Crown.

The degree of a requirement to obtain Indigenous consent is dependent on the strength of a claim to title. In *Haida Nation*, the Court stated that the scope of the duty to consult "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title,

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<sup>213</sup> *Tsilhqot'in Nation*, *supra* note 3 at paras 93-4.

and to the seriousness of the potentially adverse effect upon the right or title claimed.”<sup>214</sup> Correlatively, this scope is significantly expanded where title is established because the claiming groups are apparently title-holders and are no longer claiming title to land. Rather, at stake here is the determination of the extent in which the Crown-contemplated action will adversely affect their right or title. Further, the government cannot justify their failure to consult simply because they have assessed the strength of the claim according to the spectrum analysis and found that it falls within the low threshold. In *Haida Nation*, we understand that the scope of the duty does not only include “the strength of the case” but also, “the seriousness of the potentially adverse effect” on the Aboriginal right at stake. If therefore the adverse effect will deprive the right-claimants the ability to exercise those rights, they are entitled to be consulted - period.<sup>215</sup>

Where title to land is yet to be established, the Court in *Tsilhqot’in Nation* warns about the precariousness of being governed *stricto sensu* by the “scope analysis” established in *Haida Nation* in determining whether consultation alone suffices. It went on to say that “government and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.”<sup>216</sup> Best practice should therefore dictate that parties, especially project proponents and the government should set consent-seeking as a consultation goal within the accommodation phase of the duty to consult. This will be discussed in the final chapter of this thesis.

### **3.2.1. When the Duty to Consult Arises**

This section discusses a few instances where the duty to consult has been held to arise by the courts. However, the examples discussed in this section do not represent all established cases since there have been hundreds of decisions rendered on consultation obligations of the Crown since the decision in *Sparrow*. However, an attempt is made under this section to briefly highlight some of the instances where the duty does or does not arise.

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<sup>214</sup> *Haida Nation*, *supra* note 9 at para 39.

<sup>215</sup> *Ibid.*, at 55.

<sup>216</sup> *Tsilhqot’in Nation*, *supra* note 3 at para 97.

In the *Mikisew Cree* case, the Court stated that the Crown's duty to consult includes treaty negotiations,<sup>217</sup> and that the honour of the Crown is at stake during the interpretation and application of the terms of a treaty, therefore, the Crown is constitutionally bound to consult with Indigenous peoples with regards to "taking up" of historic treaty lands under those treaties with a "taking up" clause. Further, the Court held that even where the honour of the Crown is not invoked, the fact that the Treaty 8 Nations paid a "hefty" price by surrendering land the size of France to the Crown was held to entitle them to "a distinct procedural" right to consultation with regards to the treaty lands.<sup>218</sup> Likewise, with regards to modern treaties, the Court in *Beckman v Little Salmons/Carmacks First Nation*<sup>219</sup> stated that the scope of consultation is determined by the consultation provisions embedded in the treaty, including the creation of environmental and review processes set up to regulate the projects on and off treaty lands,<sup>220</sup> although it does not extend to contemplated changes in legislations that may affect treaty rights.<sup>221</sup>

Consultation duties of the Crown is also invoked when the government is making "strategic, higher level decisions" that may adversely affect Aboriginal claims or rights. In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,<sup>222</sup> the Court explained the range of government actions that will invoke the government's duty to consult, for example, actions such as transfer of tree licences, approval of multi-year forest management plan for a large geographic area, and the establishment of a review process for a major gas pipeline. However, it left "for another day" the question of whether government conduct includes legislative action.

### 3.3. Conclusion

In December 2016, six years after the *Rio Tinto Alcan Inc.* decision, the Federal Court of Appeal in *Canada (Governor General in Council) v Mikisew Cree First Nation* finally had an opportunity to decide whether the Crown has a duty to consult with Indigenous groups when

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<sup>217</sup> *Mikisew Cree*, *supra* note 11 at para 4.

<sup>218</sup> *Ibid.*, at para 51.

<sup>219</sup> *Little Salmons/Carmacks First Nation*, *supra* note 52.

<sup>220</sup> *Dene Tha'*, *supra* note 176 at para 100.

<sup>221</sup> *Canada v Mikisew Cree FN (2016)*, *supra* note 192.

<sup>222</sup> *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, at para 44, [2010] 2SCR 650.

contemplating changes to legislation that may adversely affect their treaty rights. The fact of the case is that in 2012, Bill C-38 (*Jobs, Growth and Long-Term Prosperity Act*) and Bill C-45 (*Jobs and Growth Act*), were introduced by the Minister of Finance. These bills resulted in the repeal of some other oversight legislations, for example, the *British Columbia Environmental Assessment Act*, as well as the amendment of several others, for example, the *Fisheries Act* and the *Canadian Environmental Protection Act*. The Mikisew Cree First Nation alleged that the omnibus bills may affect their treaty rights to hunt, fish and trap because these oversight legislations allowed them to voice their concerns over the exercise of their treaty rights.

The Court held that there was no duty to consult with Indigenous peoples prior to the enactment of legislation. According to the court, the recognition of Canada's unwritten constitutional principles of Parliamentary sovereignty and the separation of powers doctrine precludes the courts from meddling with the exercise of legislative functions. Therefore, because of the separation of powers doctrine, the courts are prevented from intervening in the law-making process of the Parliament; rather, it is within the powers of the courts to provide a remedy after a bill has been enacted.<sup>223</sup> The implication of the restraints imposed by the separation of powers doctrine is that the courts are prevented from imposing on the executive arm of government, a duty to consult with Indigenous peoples during the legislative process of enacting a bill.<sup>224</sup>

In essence, this decision can be interpreted as being a limitation on the constitutional right of Indigenous peoples to be consulted when a government action is likely to adversely affect their claims or rights. Where the Crown is aware, either by real or constructive notice, that a contemplated legislation will likely affect Aboriginal or treaty rights, does it owe a constitutional duty to invite the affected groups and stakeholders to a forum to discuss their concerns about the bill?

The court in this case held that they are not entitled to such consultation obligations because "to come to the opposite conclusion would stifle parliamentary sovereignty and would cause undue delays in the legislative process" but that First Nations are not left without an option. They have the option to lobby government officials as well as parliamentarians in order to ensure that their

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<sup>223</sup> *Ibid.*, at 59.

<sup>224</sup> *Ibid.*, at 60.

rights and concerns are appreciated and taken into consideration during the introduction of a bill.<sup>225</sup> It is quite possible that they do not become aware of Parliamentary proceedings and the intention of the legislative arm of government to pass a law that may affect their rights; on the other hand, the government would.

Further, the court stated that even though they are not owed any consultation obligations at this stage, it will be necessary to consult with Indigenous peoples after the law has become effective and it adversely impacts their treaty or Aboriginal rights.<sup>226</sup> At this stage, the validity of the law could be determined and appropriate remedy could be administered. The apparent disadvantage of this is that it is an obvious waste of Parliamentary time and resources to first enact a statute and then more resources poured over court deliberation of its validity, and eventually, striking it down. It is like seeking a solution after the fact, which could have been cured through early consultations and where necessary, accommodation of concerns by removal or redrafting the invalid aspects of the proposed bill. The suggestion is not that consultations must be had regarding every legislation that may affect Indigenous claims or rights; but where such a law would totally eliminate the existence of that right, there should be an opportunity for the right holders to first, become aware of that bill and secondly, provide information as to how such a law when enacted, would affect their rights or when breached, may affect their liberty.

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<sup>225</sup> *Ibid.*, at 62.

<sup>226</sup> *Ibid.*, at 63.



## CHAPTER 4

### 4. Domestic Standards for Consultation: Federal Government and British Columbia

#### 4.1. Federal Consultation Structure

Similar to how the judiciary avoids meddling in the affairs of the legislative arm of government, they also steer clear of dictating to the executive arm on how it should implement its constitutional duty to consult with Indigenous peoples. In response to the decisions of the Court in *Haida, Taku River* and *Mikisew Cree*, in 2008, Canada established the Consultation and Accommodation Unit (the “CAU”) within the Ministry of Aboriginal Affairs and Northern Development Canada (AANDC). The CAU began training officials nation-wide and they came up with first, an interim guideline on consultation with Indigenous peoples, and later in 2011, an *Updated Guideline for Federal Officials to Fulfil the Duty to Consult* (the “Updated Guideline”) which takes into consideration, more recent court decisions.<sup>227</sup>

According to the Updated Guideline, Canada’s approach to consultation will take into account the differences in the history of Indigenous communities, their geography, governance structures, demographics and the differences in context; for example, whether Indigenous communities to be consulted are signatories to treaties, comprehensive land claim agreements or self-government agreements.<sup>228</sup> Under Guiding Principle No. 6 of the Updated Guideline, existing provincial, territorial or industry mechanisms may be relied on in streamlining decision making. While it acknowledges Aboriginal groups as partners, and that information gathered during consultation with the groups could be used in meeting its consultation obligations (Guiding Principle No. 7), the Updated Guideline fails to incorporate existing Indigenous decision-making mechanisms within its consultation practices.<sup>229</sup> Rather, it simply states that information gathered as a result

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<sup>227</sup> Indigenous and Northern Affairs Canada, “Aboriginal Consultation and Accommodation, Updated Guidelines for Federal Officials to Fulfill the Duty to Consult, (March 2011), [the “Updated Guideline”], online: <[http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui\\_1100100014665\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf)>.

<sup>228</sup> *Ibid.*, at 8

<sup>229</sup> The First Nations Leadership Council, *Advancing an Indigenous Framework for Consultation and Accommodation in BC: Report on Key Findings of the BC First Nations Consultation and Accommodation Working Group*, (2013) 44,

of consultation with the groups may be used in meeting its obligations, but nowhere in the guideline is Indigenous consensus style of decision-making incorporated in the document. This appears to be a reductionist approach to compliance with case law (if reconciliation remains its ultimate goal), considering that the consultation to be had in the first place is with those Indigenous communities.

Further, the pre-consultation analysis and planning stage of the Updated Guideline requires a step-by-step analysis of whether or not a duty to consult exists, and if it does, what the strength of the claim is or the severity of adverse impacts on the claim.<sup>230</sup> Government officials will have to first (1) describe the proposed Crown conduct, (2) identify whether it has an adverse impact on potential or established Aboriginal or Treaty rights, (3) identify and ascertain which Aboriginal groups are in the area and their respective potential or established Aboriginal or Treaty rights, and (4) determine whether a duty to consult exists. The fourth and final pre-consultation analysis is the most crucial because it determines whether or not the Crown would be legally required to proceed with the consultation process. If after following the three-fold steps established in *Haida Nation* for determining when the duty is triggered and it is still uncertain as to whether or not a duty to consult exists, the government would meet with Aboriginal groups to verify its analysis.

From the foregoing, it is unsure how neutrality is reflected by the Crown as a fiduciary when it meets with Indigenous groups to discuss the strength of their claim. If during the pre-consultation stage it is determined that no adverse impact would be had to existing Aboriginal and Treaty rights, how would the government also achieve its objective at the “verification meeting” with the Aboriginal groups? The Updated Guideline states that “the nature and seriousness of potential adverse impacts of a proposed activity will become more apparent to officials as information is gathered” and that “the strength of a claim assessment is an historical

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online: <[http://fns.bc.ca/wp-content/uploads/2016/10/319\\_UBCIC\\_IndigActionBook-Text\\_loresSpreads.pdf](http://fns.bc.ca/wp-content/uploads/2016/10/319_UBCIC_IndigActionBook-Text_loresSpreads.pdf)> at 13-16, [Report of the Working Group].

<sup>230</sup> *Ibid.*, at 36-50.

and anthropological analysis of the facts of a particular claim asserted by an Aboriginal group in the area of the proposed activity.”<sup>231</sup>

What is clear from this approach is that where potential rights are claimed, it is the Crown who determines the following three crucial factors: (1) whether there would be a potential adverse impact on a contemplated project (unless Indigenous communities likely to be affected are invited to indicate their concerns after they have been provided with clear and relevant information regarding the proposed project and any potential adverse impact); (2) the strength of the claim of an adverse impact; and (3) the extent of accommodation that is required to cure the infringement of their Aboriginal or Treaty rights.<sup>232</sup>

Some of the concerns raised by some Indigenous groups regarding the Updated Guideline are that there is no provision in it that allows them to determine the extent to which their rights have been adversely affected or how strongly their rights would be limited.<sup>233</sup> They feel that by locating the proposed project on their lands, they, and not the government, should determine the gravity of the impact on their rights.<sup>234</sup> Instead, the Updated Guideline states that the three crucial factors would be determined by government officials. This reflects a one-side approach towards the process, when in fact; consultation should be about sharing their respective views about how to resolve their concerns about the project. In essence, the Updated Guideline does not take into consideration the fact that the affected communities may have existing traditional consultation processes reflective of their laws and values in deciding whether or not their rights are likely to be adversely impacted and how strong their claim should be.<sup>235</sup>

On the other hand, if it is determined that a duty to consult exists, the scope of the duty would be examined at stage 5 according to the spectrum analogy proposed by the SCC in *Haida Nation*. After skipping the hurdle of stage 4, this stage represents another major hedge that determines whether or not legal proceedings will ensue if the consultation process is not successful. At this stage, government officials would be making a quasi-judicial determination of whether or not

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<sup>231</sup> *Ibid.*, at 42.

<sup>232</sup> *Ibid.*, at 41.

<sup>233</sup> Report of the Working Group, *supra* note 229 at 114.

<sup>234</sup> *Ibid.*, at 111-114.

<sup>235</sup> *Ibid.*, at 20.

Indigenous claims to title or right is strong enough to warrant accommodation of any concerns that may arise from the proposed project. The officials would be required to wear two hats and determine firstly, whether or not the claimed Aboriginal and Treaty right is strong, weak or moderate; and secondly, whether their concerns would be accommodated. The apparent risk associated with the multi-role function of the government officials at this stage is that they become judges in a cause in which they have a high-interest stake, and this is likely to result in blurred decisions.<sup>236</sup>

#### **4.1.1. Determining Indigenous Decision-Makers under the Updated Guideline**

In *Delgamuukw v. British Columbia*, the Court stated that there is always a duty to consult because of the incidents of Aboriginal title, and that government officials are responsible for determining which group of Indigenous representatives to consult with.<sup>237</sup> Indeed, this is a crucial task because failure to consult with the authorized decision-makers within the group could still lead to delays in the project. The Updated Guideline requires officials to verify authorized decision-makers by requesting a letter from their representative that confirms their community's acceptance to be led by them.<sup>238</sup> It also requires the officials to have knowledge of the issues within the community and region because it would assist in understanding how the proposed project is likely to affect their culture and traditional practices.

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<sup>236</sup> *Haida Nation supra*, note 9 at paras 51-2. The Court stated that the government alone owes Indigenous peoples the duty to consult, and that "it is open to the governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts." Although, the *Updated Guideline* is a policy response to the SCC decision, it does not provide an opportunity for affected Indigenous communities to determine how they feel their rights have been impacted and how the contemplated project will affect their lives, tradition or cultural practices. This is one major reason why there has been several cases litigated on lack of or insufficiency of consultation. example, *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2006), 4 CNLR 152; *Wii'litswx v. British Columbia (Minister of Forests)*, [2008] BCSC 1139; *Gitxaala Nation v. Canada (Minister of Transport, Infrastructure and Communities)* [2012] FC 1336; *White River First Nation v. Yukon (Minister of Energy, Mines and Resources)*, 2013 YKSC 66, 2013; *Squamish Nation v. British Columbia (Minister of Community, Sport and Cultural Development)*, [2014] BCSC 991.

<sup>237</sup> *Delgamuukw, supra* note 16.

<sup>238</sup> The Updated Guideline, *supra* note 227 at 47.

It is interesting to note that the Updated Guideline recognizes that several Indigenous groups have developed their own consultation policies that must be adhered to by the Crown. However, it mandates officials to follow the Updated Guidelines, but that “understanding the policies, guidelines or protocols of the Aboriginal group may become the starting point for a discussion in an effective and meaningful consultation process.”<sup>239</sup> In essence, the Updated Guideline fails to incorporate Indigenous perspectives to the extent that it overrules any Indigenous consultation practices in areas where they conflict, especially when consent is requested by the affected groups.

In 2013, First Nations Leadership Council (FNLC) charged a Working Group to gather and develop a framework that seeks to mirror First Nations standards for consultation and engagement consistent with Canadian jurisprudence and worldviews.<sup>240</sup> As a result, the Working Group came up with a “Report on Key Findings of the B.C. First Nations Consultation and Accommodation Working Group,” (the “Report of the Working Group”), which recognizes the need to “bring life to the words of First Nations people,”<sup>241</sup> and describes the Updated Guideline as falling short of meeting the high standards that First Nations have come to expect.<sup>242</sup> Based on the large number of cases that have been litigated on the issues of consultation or lack thereof, there appears to be a huge conflict on the right approach to fulfilling the duty to consult between the Crown and its Indigenous partners. Several criticisms revolve around the Government of Canada’s inability to recognize and accept Indigenous legal orders as sovereign bodies able to decide for themselves how they wish to deal on their lands. The result is that the current approach under the Updated Guideline often hinders substantive reconciliation because it wholly

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<sup>239</sup> *Ibid.*, at 48.

<sup>240</sup> Report of the Working Group, *supra* note 229. The Working Group was given the mandate to “consider an overall First Nations approach for Crown consultation and accommodation of First Nations legal interests” and to fashion out ways of approaching consultation in a manner that puts across First Nations’ voices.

<sup>241</sup> *Ibid.*, at 7.

<sup>242</sup> *Ibid.*, at 16. One of the areas identified by the Working Group is that the Updated Guideline lays emphasis on the use of “existing processes” used by the government to meet its duty to consult, without proper consideration of Indigenous perspectives on consultation.

relies on rules and processes handed down by the courts as opposed to what really works for occupants of the lands.<sup>243</sup>

## 4.2. British Columbia's Consultation Process

It is impossible to complete a historical sketch of treaty-making process in B.C. without a mention of the decision in *Calder*. Before the historic decision in *Calder*, British Columbia rejected Aboriginal claims to title and refused to negotiate treaties. The Province simply refused to accept the concept that Aboriginal title existed and that Aboriginal title claimants were entitled to special interests in land beyond and above other British Columbians.<sup>244</sup> Harry Swain, a former deputy minister of Indian and Northern Affairs describes it frankly that the “Crown asserted title to all the territory, granted fee simple title to white settlers, sold off timber rights, granted mineral titles, flooded valleys central to traditional territories of the Indigenous peoples.”<sup>245</sup>

However, the landscape of Indigenous titles and the Provinces approach to title claims significantly changed in 1973, when the SCC recognized in *Calder* that Aboriginal title existed as a concept in Canadian common law.

The constitutional impetus to negotiate treaties heralded by the *Calder* and *Haida Nation* decisions conscripted the province into negotiating and consulting with Indigenous peoples of British Columbia.<sup>246</sup> In *Calder*, the Court was divided in its decision. According to Judson J.,

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<sup>243</sup> *The Updated Guideline*, *supra* note 227 at 16. See also, Harry Swain, “Paths to reconciliation in the post-Tsilhqot’in world”, *supra* note 209, where the Swain describes junior government officials as negotiators “on short leashes who cannot take us to agreement and reconciliation.”

<sup>244</sup> Richard T. Price, “The British Columbia Treaty Process: An Evolving Institution.” *Native Studies Review* 18, no. 1 (July 2009): 139-167 at 144. Academic Search Complete, (ASC) EBSCOhost.

<sup>245</sup> Swain, “*Paths to reconciliation in the post-Tsilhqot’in world*”, *supra* note 209 at 1-8. He said that “the province has been dragged kicking and screaming all the way. BC does not want to recognize Aboriginal title, or relinquish its grasps on First Nations’ traditional territories or resources, or watch the slow seeping away of their resources into the hands of an upstart new level of government.” Further, Swain adds that the province can be racist and insensitive during negotiation especially when they demand excessive information from First Nations.

<sup>246</sup> Ministry of Environment, Lands and Parks, “Guidelines for Pre-Treaty Consultations with First Nations”, (May 1994), online: <https://www.for.gov.bc.ca/hfd/library/documents/bib71628.pdf>>. This was the first consultation policy in British Columbia formulated to provide the Ministry with consultation guidelines with Aboriginal peoples during the pre-treaty period at the time.

Martland and Ritchie JJ, the appellant Nisga'a Nation were outside the scope of the Royal Proclamation of 1763, therefore their claim to Aboriginal title could not be sustained. Hall J., Spence and Laskin JJ declared that their rights to possession of the land was not extinguished by the province,<sup>247</sup> while Justice Pigeon held that the Court had no jurisdiction to make a declaration to title in the absence of a fiat of the Lieutenant-Governor of British Columbia, as such, the action failed on technical reasons.<sup>248</sup>

In terms of results achieved in litigating *Calder*, one can conclude that it failed to achieve its goal of establishing title to lands claimed, but in practical sense, *Calder* is considered a huge success in the history of Aboriginal title in Canada. For example, as a result of the *Calder* decision, the Nisga'a Final Agreement was concluded in 2000. The Agreement is the first modern treaty in British Columbia and it negotiated both land claim settlement and self-government arrangements, which are both protected under the constitution.<sup>249</sup> The same year that *Calder* was decided, the province created an *Office of Native Claims* within the Department of Indian and Northern Affairs (DIAND) and in 1995, Aboriginal rights policy was developed and the governments of Canada and British Columbia began initiating negotiation of modern treaties with Indigenous peoples through the British Columbia Treaty Commission process.<sup>250</sup>

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In the "Updated Procedures for Meeting Legal Obligations when Consulting First Nations" (Interim) [May 7, 2010] at 7, online: < <http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations> > at 3 [the "Updated Procedure"]. The British Columbia consultation policy identifies court decisions and commitment to building new relationships (due to court decisions) as the reasons why they are in compliance with the constitutional duty to consult. These are some of the issues identified by the Working Group as what plagues the consultation process in B.C., See *Report of the Working group, supra*, note 229 at 16. Further, the Report faults the Updated Guideline because it was developed as a result of litigation, and not from the government's political will or its desire to foster relationships with Indigenous peoples.

<sup>247</sup> *Calder, supra* note 35 at para 183

<sup>248</sup> *Ibid.*, at para 192

<sup>249</sup> Nisga'a Lisims Government "Understanding the Treaty" online: <<http://www.nisgaanation.ca/understanding-treaty>>

<sup>250</sup> In 1993, the British Columbia Treaty Commission ("BCTC") was established with a mandate to oversee the negotiation of claims in British Columbia. The BCTC process is different from all other processes in Canada mainly because the government recognized that most of the province is encumbered with Aboriginal rights. Also, in 1973, the Office of Native Claims ("ONC") was established but it was wrought with complaints and criticisms because of the dual role it was mandated to carry out in reviewing claims arising from the failure of the government to discharge its duties. As a result of continued complaints of conflict of interest in the ONC's mandate, the Penner Report on Indian Self-Government of 1983 recommended that the 1982 *Outstanding Business: A Native Claims*

Before 1982, there was no constitutional protection of Indigenous rights and title, however, by virtue of section 35(1) of the *Constitution Act, 1982*, “existing Aboriginal and treaty rights of the Aboriginal peoples of Canada became recognized and affirmed.” Also, the Royal Proclamation of 1763 and the reconciliation objectives of Canada contributed to a constitutional desideratum to consult with Indigenous peoples which in turn necessitated the formulation of policies to serve as guidelines. However, there have been several criticisms against the provinces approach to fulfilling its constitutional duty to consult, chiefly, that the measure of consultation deployed appears to be a continuation of its previous pattern whereby it refused to negotiate and reach agreements with Indigenous peoples. Another criticism is that most of its past policies are not self-proposed policies birthed as a result of the provinces’ desire to build lasting relationships; rather, they are formulated in response to court decisions.<sup>251</sup> Further, the approach taken by the province fails to recognize Indigenous cultural practices, tradition and Indigenous peoples’ approach to governance.<sup>252</sup>

British Columbia has developed several guides to help proponents appreciate the legal framework of doing business within the province.<sup>253</sup> Some of these guides also aim to ensure that lasting and respectful relationships are fostered with First Nations. For example, the *Building Relationships with First Nations: Respecting Rights and Doing Good Business* guide highlights the importance of building good relationships with Indigenous peoples such as, ensuring certainty of process, access to a labour force, service and local knowledge, marketing and social responsibility and support for government consultation.<sup>254</sup>

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*Policy-Specific Claims* resolution model should be replaced with an independent body. As a result, the *Specific Claims Resolution Act* was introduced in 2002 to speed up the settlement of specific claims in Canada. For more on the history of specific claims resolution models in British Columbia, see Specific Claims Tribunal Canada, online: [http://www.sct-trp.ca/hist/hist\\_e.htm](http://www.sct-trp.ca/hist/hist_e.htm).

<sup>251</sup> For more on other B.C.’s consultation policies, see “A Short History of British Columbia Policies on Consultation and Accommodation with First Nations” in Report of the Working Group, *supra* note 229 at 91.

<sup>252</sup> Joanne Barnaby, “Indigenous decision making process: what can we learn from traditional governance?” (2009) pdf available online <<http://www.arcticgovernance.org/indigenous-decision-making-processes-what-can-we-learn-from-traditional-governance.4667318-142902.html>>.

<sup>253</sup> British Columbia, “Guides to Consulting with First Nations”. Online: <http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations>.

<sup>254</sup> British Columbia, “*Building Relationships with First Nations: Respecting Rights and Doing Good Business*” at 6. Online: <[http://www.bcbc.com/content/594/WorkingWithFirstNations\\_v02.pdf](http://www.bcbc.com/content/594/WorkingWithFirstNations_v02.pdf)> [the “Proponent Guide”].



#### 4.2.1. British Columbia's Consultation Guides and Policies

The principal guideline used by B.C. Government officials when consulting with Indigenous peoples is the *Updated Procedures for Meeting Legal Obligations when Consulting First Nations* (the “Updated Procedures”).<sup>255</sup> According to the Updated Procedures, the goal of the province is to ensure (1) respect for Aboriginal and treaty rights, (2) improved relationship between the province and First Nations, (3) predictable and transparent process, and (4) reconciliation of rights and interests.<sup>256</sup>

The consultation process under the Updated Procedures in B.C. is divided into four phases, with each phase having sub-tasks to be achieved. The phases are: (1) Preparation, (2) Engagement, (3) Accommodation, and (4) Decision and Follow-up. The process of identifying Indigenous decision-makers is not clearly stated, however, the Updated Procedures provide that the province prefers to consult with bands (elected under the *Indian Act*), or the larger community groups.<sup>257</sup>

Further, in complying with the spectrum analogy in *Haida Nation* for the purpose of determining what level of consultation is required, the Updated Procedures describes each spectrum as ranging from “notification” to “deep”, with “normal” being on the average spectrum. For example, where a major project that requires multiple permits like the Trans Mountain Pipeline project is proposed, the Updated Procedures recognizes the need for a more extensive process requiring deep consultation.<sup>258</sup>

There are also other policies which guide proponents in doing business in B.C. These include the guide to Building Relationships with First Nations: Respecting Rights and Doing Good Business, the Guide to Involving Proponents when Consulting First Nations and other sector-specific operational guidelines such as the Proponents Guide to First Nations Consultation in the

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<sup>255</sup> The Updated Procedures for Meeting Legal Obligations when Consulting First Nations (Interim) has been identified by the Province as the main guideline that informs its consultation process. However, according to the Report on the Working Group, there are two more documents which serves as a guide to government officials but has not been shared with Indigenous peoples because it is covered by solicitor-client privilege, see, Report of the Working Group, *supra* note 229 at 17.

<sup>256</sup> The *Updated Procedures* *supra* note 246 at 7.

<sup>257</sup> *Ibid.*, at 9.

<sup>258</sup> *Ibid.*,

Environment Assessment Process and the Clean Energy Production in B.C: An Interagency Guide Book for Proponents.<sup>259</sup> It would be impossible to review and discuss within this thesis, the detailed contents of these guides and how they incorporate Indigenous perspectives on consent. However, in order to compare Indigenous perspectives on consultation, including that of the Gitksan peoples, with British Columbia's approach to consultation, a brief discussion of these guides and policies would be undertaken.

The *Building Relationships with First Nations: Respecting Rights and Doing Good Business* [the "Proponent Guide"] is a specific guide to project proponents that provides an understanding of the legal framework of Aboriginal rights issues in British Columbia. Even though the courts have held that there is no legal duty on third parties to consult with Indigenous peoples,<sup>260</sup> the purpose of the Proponent Guide is to ensure that they are aware of these rights, and are able to build lasting and respectful business relations with the rights-holders. Therefore, proponents are enjoined to follow this guide as well as, have a thorough understanding of consultation processes specified under the Updated Procedures, which is the government's primary consultation guide.

Under the Proponent Guide, four approaches are identified by the province as the approaches taken in building relationships and resolving Aboriginal rights issues in British Columbia. They are: (1) consulting with First Nations interim to resolution of the Aboriginal rights question, (2) negotiating treaties for long term reconciliation of Provincial and Aboriginal interests, (3) negotiating agreements interim to resolution of the Aboriginal rights question and (4) improving socio-economic conditions of First Nation People.<sup>261</sup>

Under the first approach, the government assigns some procedural aspect of consultation to project proponents because they are in the best position to know the details of their proposed project. They are further encouraged to engage First Nations at the early stages of the project even before the government begins its consultation processes. During consultation, proponents

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<sup>259</sup>British Columbia, "Consulting with First Nations", online: <<http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations>>

<sup>260</sup> *Haida Nation*, *supra* note 9 at 56.

<sup>261</sup> The "Proponent Guide", *supra* note 225 at 4-6. The benefits of adhering to the provisions of the Proponent Guide have been identified as ensuring certainty for processes; access to labour force, services and local knowledge, support for government consultation and fulfilment of proponent's social responsibility. See also, Report of the Working Group, *supra* note 229 at 96-9.

are encouraged to participate in meetings, share detailed information and modify previous plans to ensure that Indigenous concerns are addressed.

The second approach includes treaty negotiation process under the British Columbia Treaty Process discussed above, while the stated objective of the third approach by the Province is to apply a “flexible approach” towards entering into interim agreements which “seeks to balance the legal and non-legal interests of First Nations and the Province until full and final reconciliation is achieved.”<sup>262</sup> The fourth and final approach is when agreements such as Impact and Benefit Agreements (IBAs) are entered into between affected Indigenous communities and third party project proponents.<sup>263</sup>

Finally, B.C. also has its ways of resolving land claims made by two or more Indigenous groups according to case law. Where there are overlapping claims between two or more Indigenous groups, the B.C. government takes the approach of negotiating the issues between Indigenous nations as suggested by the *Delgamuukw* Court.<sup>264</sup> As such, the Province resolves such overlapping claims through negotiation committees consisting of Indigenous community leaders and elders. Funding is also provided for neutral mediation where the parties are unable to reach an agreement after negotiation. In situations where all efforts at negotiation and neutral mediation fails, non-derogation language is enlisted to provide that the agreements reached are without prejudice to the rights of the Indigenous parties with the overlapping claims.<sup>265</sup>

This method of resolving overlapping claims has been criticized by some authors who suggest that the current negotiation and consultation schemes should be reformed to allow parties the opportunity to submit issues before independent claims tribunals for a binding decision or to seek

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<sup>262</sup> *Ibid.*, at 5.

<sup>263</sup> *Ibid.*

<sup>264</sup> *Delgamuukw supra*, note 16 at paras 185-186.

<sup>265</sup> Indigenous and Northern Affairs Canada, “Resolving Aboriginal Claims - A practical Guide to Canadian Experiences” (Ottawa: 2003), online: <http://www.aadnc-aandc.gc.ca/eng/1100100014174/1100100014179>>.

judicial intervention. This, it is argued, would ensure that resolutions reached by the tribunal or court are binding on all parties.<sup>266</sup>

#### **4.2.2. Criticism of British Columbia's Consultation Process**

There is no doubt that it is quite impossible for a legislation or policy to be perfect and to satisfy all the gaps it was enacted to fill, and this is true of the B.C. consultation guidelines and procedures. For instance, certain aspects of consultation guides and procedures in British Columbia have been criticized by different groups and Indigenous partners as being impractical and full of processes. The result is that projects are delayed as Indigenous groups continue to assert their title rights, and investors are unable to obtain a social licence to operate within Indigenous lands.

Firstly, in determining whether an Aboriginal group is owed a duty to consult within the “normal” range of the spectrum, the Updated Procedures provide that consultation and accommodation will be triggered where there is a “likely impact on a reasonable claim or a reasonable probability of an infringement of a proven aboriginal right or title.”<sup>267</sup> The Court in *Tsilhqot'in Nation* is clear on this point: where title is proved, consent is mandated; where there is a strong claim to title but it is unproven, it is highly recommended.<sup>268</sup> The words “reasonable” or “likely” used in the Updated Procedures can be subjective, and the province, wearing multiple hats of responsibilities to different groups of its citizens, may not be in the best position to determine when a claim is reasonable or likely to be impacted.

Further, the Updated Procedures identifies that the goal of phase two engagement with Indigenous peoples is to “substantially address and accommodate their interests where required.”<sup>269</sup> The problem with this engagement approach is that it is a “take it or leave it”

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<sup>266</sup> For more on overlapping claims, see Christopher Devlin and Tim Thielmann, “Overlapping Claims: In Search of ‘A Solid Constitutional Base’” (Paper for the CBA Aboriginal Law Section’s Annual CLE), (June 12 and 13, 2009) Victoria, B.C. online: [http://www.dgwlaw.ca/wp-content/uploads/2014/12/Overlapping\\_Claims.pdf](http://www.dgwlaw.ca/wp-content/uploads/2014/12/Overlapping_Claims.pdf).

<sup>267</sup> The *Updated Procedure*, *supra* note 255 at 11.

<sup>268</sup> *Tsilhqot'in Nation*, *supra* note 3 at para 97.

<sup>269</sup> The *Updated Procedures* *supra* note 255 at 14.

approach which Indigenous peoples are not prepared to settle for. Also, the Updated Procedures mandates that where after sending requests to Aboriginal groups who may be adversely affected by the project, to provide further information about their concerns and they do not respond, the government officials should proceed to decision and follow-up stage of the consultation process.<sup>270</sup>

Several other issues have also been discovered by the FNLC's Report of the Working Group regarding the approaches taken by the governments of Canada and British Columbia to consultation. Some of them are that the Guidelines and Procedures "are not driven to achieve reconciliation", and that the provincial policy on consultation focuses on the procedural aspect of the duty as opposed to the substantive aspect which makes it "reductionist" and not achieving the goals identified by case law.<sup>271</sup> This is consistent with the view held by Harry Swain; that the government's emphasis on process and procedures do not allow official negotiators to be flexible and creative in finding timely solutions to Indigenous concerns. This in turn leads to delays in fashioning solutions and finalizing agreements. Further, Swain is of the view that it is becoming increasingly clear that during negotiations, government representatives sent to the tables are unable to make final decisions because they always have to go back to consult with their "string-pullers" in Ottawa, which shows utmost disrespect to Indigenous parties across the table.<sup>272</sup>

### **4.3. Indigenous Governance Structures and Consultation Processes**

Canadian jurisprudence recognizes Indigenous peoples' special rights in land and natural resources. After several decades of litigating Indigenous rights, the SCC declared in *Tsilhqot'in Nation* that the claiming group had established title to land. The decision in *Tsilhqot'in* makes it

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<sup>270</sup> *Ibid.*, at 16-20. The officials are required at all stages, to maintain detailed records documenting their actions and outcomes at each step for future reference. The Updated Procedures provides that where deep to normal consultation is required, the officials should "consider articulating the reasons for decisions, including what accommodation, if any, has been deemed appropriate." The approach and language of the decision stage again, reflects a "leave it or take it" stance. It does not provide Indigenous claimants with deep consultation rights stemming from strong or proven claims to title with an opportunity to make the final decisions based on accommodation, considering their unique right-holder perspectives.

<sup>271</sup> *Report of the Working Group*, *supra* note 229 at 17 & 93-101.

<sup>272</sup> Swain, "Paths to reconciliation in the post-Tsilhqot'in world", *supra* note 209 at 5.

clear that Indigenous title-holders have a right to give or withhold their consent to any development or actions that affect their lands. This section will examine consent from Indigenous peoples' perspectives, and will problematize how consent may be obtained from authorized decision-makers within affected Indigenous communities.

In providing answers to the aforementioned problem, this section pivots around the following issues: Which institution should dictate the forms in which consultation with Indigenous groups should take - the government, the courts or Indigenous title-holders/decision-makers? This question will foreground my discussion on the consultation duties of the Crown leading to consent from title-holders/claimants in resource development.

An examination of the decision-making process and political structure of the Gitxsan nation of British Columbia will be undertaken. Further, a consideration of how their cultural practices may be instrumental in fashioning consultation policies on consultation leading to consent will be discussed. Since *Delgamuukw*, an action instituted by the Gitxsan and Wet'suwet'en communities, the Gitxsan Nation has developed and implemented a more regimented political structure which reflects their historical practices as well as infuses modern political regime. These infused governance structures, although not without their problems, will highlight how generally, consensus is achieved within Indigenous communities.

Consultation policies in British Columbia will also be examined and compared with the Gitxsan peoples' decision-making processes. British Columbia's policies were primarily drafted by government officials taking cues from court decisions, with minimal consideration of traditional Indigenous perspectives on consultation. Rather than addressing the apparent inconsistency in its laws, the Court in *Sparrow* devised the "override provision" which allows the Crown to proceed with development on title lands without the consent of Indigenous title holders, as long as the conditions set out in *Sparrow* are met.<sup>273</sup> The implication of Crown exercise of this power translates to a lack of approval from Indigenous groups.

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<sup>273</sup> *Tsilhqot'in Nation*, *supra* note 3 at para 76, the Court held that "if the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the Constitution Act, 1982." In effect, after establishing title and the right of Indigenous groups to consent, the Court

### 4.3.1. Indigenous Perspectives on Consent

Indigenous laws and perspectives on consent are different from the common law perspective, largely because Indigenous peoples have their own distinct legal and cultural practices. This does not necessarily mean that they have an easier means of reaching consensus. In fact, Indigenous peoples have distinct traditions that come together to form a unique body of law in Canada. According to Maria Battiste and James (Sa'ke'j) Youngblood Henderson, these Indigenous laws can be intricate and heterogeneous.<sup>274</sup>

There are more than 1.4 million Indigenous people in Canada; this is equivalent to about 4.3 percent of Canada's total population. According to the National Household Survey of 2011, 60.8% identified as First Nations; 32.3% identified as Metis; while 4.2% identified as Inuit.<sup>275</sup> Because they are from distinct cultural traditions, it becomes impossible to cover all the Indigenous groups within the scope of this thesis. However, the meaning of consent from the view point of the Gitxsan Nation in B.C. would be examined. There are several reasons for choosing to examine the Gitxsan Nation in B.C. As of 2011, 16% of Indigenous peoples in Canada (or 232,290 people) live in B.C.,<sup>276</sup> and the province also records the greatest diversity of cultures in Canada.<sup>277</sup> Moreover, since 1973, landmark rulings on Aboriginal rights and title, consultation obligations and treaty rights have originated from B.C., including *Tsilhqot'in Nation*, mostly because in B.C., past governments had refused to negotiate treaties with Indigenous communities.<sup>278</sup> Further, the Gitxsan peoples of British Columbia are highly informed due to their involvements in past litigations as well as the significant scholarly works on its legal traditions.

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reclaimed Indigenous right to consent by qualifying its parameters.

<sup>274</sup> Marie Battiste & James (Sa'ke'j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: a Global Challenge* (Saskatoon: Purich Publishing, 2000) at 71.

<sup>275</sup> Statistics Canada, *Aboriginal Peoples in Canada: First Nations People, Metis and Inuit*, online: <<https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>>.

<sup>276</sup> *Ibid.*,

<sup>277</sup> Indigenous and Northern Affairs Canada, online: <<https://www.aadnc-aandc.gc.ca/eng/1100100021009/1314809450456>>.

<sup>278</sup> To mention just a few landmark SCC cases that have originated from British Columbia and have helped in shaping Aboriginal law in Canada. See, *Calder*, *supra* note 131; *Guerin v The Queen*, *supra* note 143; *R v Sparrow*, *supra* note 35; *R v Vanderpeet*, *supra* note 183; *Delgamuukw*, *supra* note 16; and *Tsilhqot'in Nation*, *supra* note 3.

Notwithstanding, resource development on Indigenous traditional territories remains hotly contested while pipeline projects continue to be approved within Indigenous territories.<sup>279</sup> Today, many Indigenous groups demand that their consent must be sought before any major development can take place on their lands.

What then is consent from Indigenous peoples' perspective? According to Jeremy Webber, "consent is concerned with the relationship between members' subjectivity and political authority."<sup>280</sup> For example, consenting Indigenous groups may only be able to provide consent to a project if they have the political and legitimate power to consent within the framework of their inherent obligations to the land. However, like Aboriginal title, the issue of consent is best understood from an Indigenous perspective. This outlook appears logical because consent in itself connotes approval or assent to an action or event, and it would be highly ironic not to understand consent in this context from an Indigenous perspective. It is therefore imperative to provide Indigenous traditions the opportunity to breathe life into matters that affects their lives and culture. This is consistent with the Court's decision in *R v Marshall; R v Bernard*,<sup>281</sup> where it was stated that "it would be wrong to look for indicia of Aboriginal title in deeds or Euro-centric assertions of ownership. Rather, we must look for the equivalent in the Aboriginal culture at issue".<sup>282</sup> In effect, jurisprudential recognition of the need for consent from title-holders correlatively entails that such consent should be dictated by Indigenous people, according to their terms, and in accordance with their existing legal order.

Indigenous people demand a higher level of consultation leading to consent prior to the commencement of resource development on their traditional lands. Some Indigenous groups are not opposed to resource development but they want it done on their terms through adequate consultation and in some cases, consent.<sup>283</sup> Projects approved by government without Indigenous

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<sup>279</sup> Bruce Cheadle, "Liberals approve Trans Mountain and Line 3 Pipeline projects, rejects Northern Gateway" *CTV News*, (November 29, 2016), online: <<http://www.ctvnews.ca/politics/liberals-approve-trans-mountain-and-line-3-pipeline-projects-reject-northern-gateway-1.3182052>> [Bruce Cheadle].

<sup>280</sup> Jeremy Webber, "The Meaning of Consent" in Jeremy Webber and Colin M. Macleod, eds., *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press 2010) at 9.

<sup>281</sup> *R v Marshall; R v Bernard*, *supra* note 183.

<sup>282</sup> *Ibid.*, at 61.

<sup>283</sup> For example, the *Oral Intervention from Saugeen 11 Nation in the Matter of Ontario Power Generation Inc.*, as part of the SON's submissions to the Deep Geologic Repository Joint Review Panel, online: <<https://www.ceaa->



consent are likely to face turbulent set-backs along the way. For instance, when the Trans Mountain project was approved in late 2016, Indigenous leaders vowed to intensify their struggle not to agree to the project saying that the standard of consent is one of consensus amongst their people.<sup>284</sup> Clearly, industry, government and other stakeholders stand to greatly benefit from projects having the approval of affected Indigenous communities in the form of their freely obtained consent.

#### 4.4. Indigenous Law and Decision-Making Process

When it comes to making decisions regarding their people and territories, Indigenous peoples are guided by their laws.<sup>285</sup> These laws have existed prior to their contact with European settlers, and have continued to exist irrespective of whether or not their laws are recognized by the government.<sup>286</sup> As a result, Indigenous decision-making processes are different from non-Indigenous governance structures. While Indigenous process can function in the general Canadian system, the Canadian system has not been designed to function within Indigenous traditional systems.<sup>287</sup>

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[acee.gc.ca/050/documents/p17520/93388E.pdf](https://www25.ice.gc.ca/050/documents/p17520/93388E.pdf)> at 73-81. At page 80, the Saugeen Ojibway Nation submitted that “the level of accommodation required demands that the project not proceed unless and until SON has given its consent to the construction of the DGR in SON Territory.”

<sup>284</sup> Bruce Cheadle, *supra* note 279. According to Grand Chief Derek Nepinak of the Assembly of Manitoba Chiefs, even though the federal government had approved the Kinder Morgan Trans Mountain pipeline project to be built from Alberta to B.C., the government did not have “their blessings” to commence the project and they will be opposing the project as it can destroy their lands and water.

<sup>285</sup> Unlike the popular mainstream view that Indigenous peoples are lawless and without any structured rules living wide and roaming free, many Indigenous groups had “self-complete, non-state systems of social ordering that were successful enough for them to continue as societies for tens of thousands of years.” See, Val Napoleon and Hadley Friedland, *Indigenous Legal Traditions: Roots to Renaissance*, in *The Oxford Handbook of Criminal Law* at 3, Markus D. Dubber & Tatjana Hornle, eds. (Oxford University Press, 2014).

<sup>286</sup> *Van der Peet*, *supra* note 183 at paras 35-43.

<sup>287</sup> J.E. Michael Kew & Bruce G. Miller, “Locating Aboriginal Government in the Political” in Michael Healey, ed. *Landscape in Seeking Sustainability in the Lower Fraser Basin: Issues and Choices*, (Vancouver BC: Institute for Resources & Environment, Westwater Research) at 47-63, [Kew & Miller]. According to these scholars, the difference between Indigenous decision-making style and mainstream Canadian is that Indigenous style is neo-tradition in nature and based on the cultural practices of the people. It is communal because decisions reached are

Several Indigenous groups live communally and many practice consensus-based decision making. For example, the Iroquois Great Law of Peace<sup>288</sup> envisions human beings as interconnected with one another, and instead of celebrating individualism like some non-Indigenous peoples do, it situates people within a clan and membership dictates one's main identity.<sup>289</sup> So unlike non-Indigenous property ownership in fee simple title,<sup>290</sup> clans owned property and right to land as a group. In fact, clan membership was not distinguished based on membership of the Five Nations of the Iroquoian Confederacy of - Mohawk, Seneca, Cayuga, Oneida, and Onondaga - rather, all nations were deemed relatives and members of the same clan. This meant that all resources and land was controlled and shared by all members of the clan. This same ideology also informs their political system of radical democracy.

According to Ernesto Laclau and Chantal Mouffe,<sup>291</sup> radical democracy “supposes the existence of equal rights for others,” and the notion in which “democratic rights must be understood.” Laclau and Mouffe said that radical democracy “will always be a question of rights which involve other subjects who participate in the same social relation” and that it must be infused by a State practicing liberal and deliberative democracy, because in their attempts to build a consensus, they oppress different opinions, races, classes and worldviews.<sup>292</sup> Similarly, this concept of radical democracy also ensures that the elected Chiefs or Sachem does not become autocratic; rather, it may guarantee that elected chiefs are responsible and can properly represent their clan failing which, they could be dismissed. For example, the highly vexing and divisive issue of identifying authorized Indigenous decision-makers became exacerbated when in August 2016, two Haida house chiefs, Carmen Goertzen and Francis Ingram were stripped of their

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often unanimously arrived at; and it is flexible because of the need to adapt to new changes within mainstream society.

<sup>288</sup> The Great Law of Peace is an orally handed down law that has been passed from generation to generation and is usually recited with the aid of the Wampum. It is a living document that applies to Iroquoians till date. Haudenosaunee Iroquois Confederacy, *Great Law of Peace*, Online: <<http://haudenosaunee.ca/5.html>>.

<sup>289</sup> David Bedford and W. Thom Workman, *supra* note 211 at 25-41.

<sup>290</sup> *Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 at 64. The Court held that Aboriginal title is not equivalent to fee simple and that it is merely close to an estate where exclusive possession could be derived at common law.

<sup>291</sup> Laclau, E and Mouffe, C. *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, at 185, (London: Verso, 2001).

<sup>292</sup> *Ibid.*, at 176-185.

hereditary titles during what has been called a “shaming feast” because they voiced their support for the Enbridge project and wrote to the National Energy Board (the “NEB”). This bold act has several very grave implications akin to an impeachment from office, and it indicates how far Indigenous nations will go to protect their governance structure.<sup>293</sup>

Elected Chiefs are enjoined to act while having as priority, the rights of all members of the clan up to seven generations yet unborn.<sup>294</sup> Decision-making was made together by all clan members and then reported to the national or confederate councils, who would only take action if unanimous support is received.<sup>295</sup>

Similarly, for the Sto:lo Nation of British Columbia, decision-making within its political structure is described as neo-traditional because they are able to fuse their ancestral traditional practices with modern day governance structures to meet with the changing times and the community needs.<sup>296</sup> As a result, it is almost impossible to discuss how generally, Indigenous people reach decisions affecting their lands and people. However, because laws, customs and traditions are what determine every individual’s right to self-determination, it would be reasonable to look into Indigenous laws and customs in identifying each group’s authorized decision-makers.

From the foregoing, it is safe to conclude that one of the most complex issues facing Indigenous nations today is the problem of identifying Indigenous decision-makers within the community. For example, this problem presented itself in *Spookw v Gitksan Treaty Society*.<sup>297</sup> The brief fact of the case is that the plaintiffs, some of whom were hereditary chiefs, challenged the right of the

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<sup>293</sup> Jeff Lee, “Northern Gateway exposes divides in First Nations governance” in *The Province* (August 18, 2016), online:<<http://www.theprovince.com/news/politics/northern+gateway+exposes+divides+first+nations+governance/12136012/story.html>>.

<sup>294</sup> Not only are the chiefs responsible for the welfare of the members of the clan alive, they are also enjoined to act while keeping in mind, the rights of unborn future generations. The words spoken at their installation as Chiefs talks about their responsibility to be selfless, slow to anger and above all, “to listen for the welfare of the whole people, and have always in view not only the present, but also the coming generations, even this whose faces are yet beneath the surface of the grounds – unborn of the future Nation” see, *Bedford and Workman*, *supra* note 211 at 30.

<sup>295</sup> *Ibid.*, at 30.

<sup>296</sup> *Kew and Miller*, *supra* note 287 at 57.

<sup>297</sup> *Spookw v Gitksan Treaty Society*, 2014, BCSC 1100 (Docket No. 15150).

defendant, the Gitxsan Treaty Society (the “GTS”), to negotiate on their behalf with the Crown. They claimed that they were excluded from making decisions, and in fact, 68% of the Gitxsan hereditary chiefs were unaware that they had an agreement with Enbridge. The court dismissed their application to wind up the GTS and held that they were not the “proper persons” to advance a claim for winding up. According to Justice McEwan, the plaintiffs had the opportunity to seek relief within the GTS; however, they chose not to be members of the GTS. Further, the court stated that self-government does not guarantee good government. At best, what they termed as community dissent should be resolved within the GTS in line with the spirit of self-government, and not turned over to the federal or provincial government, or the courts.<sup>298</sup>

In many other instances, decision-makers are easily identified because members of the group will have elected representatives who are authorized to make decisions that will be binding on the rest of the community. In such situations, members of the group have had to redefine their internal governing structure in compliance with section 74 of the *Indian Act* (which provides for the election of band councillors), or resulting from court decisions which have necessitated a more formal approach to Indigenous governance.<sup>299</sup> However, in most cases, Indigenous groups have maintained and managed their traditional lawmaking process. For example, the Gitxsan Nation is an example of a B.C. Indigenous group that still maintains most of its traditional consensus-based decision-making style. The next section of this thesis will provide an insight into how some Indigenous groups govern themselves and make decisions that affect their lands, people and traditional practices and culture.

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<sup>298</sup> *Ibid.*, at 125-139

<sup>299</sup> The Nisga’a Lisims Government (NLG) in British Columbia is a great example of a modern Indigenous decision-making governing structure that emerged in response to the landmark decision in *Calder*. After *Calder*, the Nisga’a Nation started negotiating a comprehensive land claims policy with the federal government and on May 11, 2000, the NLG came into effect after having been granted Royal Assent. The NLG has powers to pass laws and practices a democratic form of government comprised of the NLG, the four Nisga’a village governments and three urban locals. In addition, they have a 36-member legislative body which considers and passes Nisga’a Lisims Government laws while the elders provide guidance and oversight to the legislative arm of the NLG. Although the Nisga’a Nation continues to maintain its traditional laws and practices, the NLG officials are now appointed according to Nisga’a laws and are elected by all citizens of the Nisga’a Nation. Nisga’a Lisims Government online: <<http://www.nisgaanation.ca/about-2>>.

#### 4.4.1. Decision-Making amongst the Gitxsan Nation

Amongst the hundreds of Indigenous groups in Canada, the Gitxsan Nation in British Columbia is chosen for study in this research because of their participation in the *Delgamuukw* decision, as well as other reasons referenced above. The SCC decision in *Delgamuukw* was released in 1997, and its importance to modern Aboriginal right and title in Canada cannot be overemphasized. Another reason for choosing to study the Gitxsan, as will be evinced from further discussion, is the Gitxsan peoples' well developed legal reasoning process and their legal order, which enables them to make decisions in concert. Perhaps, their tenacity for justice explains their quest to litigate their rights in courts and how for the first time, the issues of consultation and accommodation, the weight to be accorded to oral history in Indigenous litigation, as well as the meaning, content and scope of Aboriginal title in Canada was addressed by the Gitxsan/Wet'suwet'en *Delgamuukw* decision. Today, several Indigenous leaders agree that if the section 35 goal of reconciliation is to be achieved, government must acknowledge Indigenous laws beyond jurisprudential analysis and incorporate Indigenous decision-making processes within its consultation frameworks.<sup>300</sup>

In examining the political structure of the Gitxsan people, it becomes apparent that Indigenous laws are old but highly structured; they are flexible but not weak, and importantly, these political structures have endured over several centuries and can still exist in the new world with little modifications. It becomes imperative that consultations should be carried out in a manner that recognizes Indigenous legal orders in order to foster relationships, recognize Indigenous rights, and reconcile Crown-Indigenous sovereignties.

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<sup>300</sup> *Report of the Working Group*, *supra* note 229 at 44. The Report states that the mandate of the government in the negotiation of treaties does not foster the recognition of Aboriginal title. Rather, the results of these treaties tend to extinguish Aboriginal title. As such, the First Nations Summit, the Union of BC Indian Chiefs, and the BC Assembly of First Nations perceived the need for Indigenous peoples nationwide to canvass for the incorporation of their legal orders within Crown consultation policies so that they can resist the approach taken at negotiating their rights and title.

## 4.5. Gitxsan Governance Structure

### I. *The Wilp*

“If one is to show respect to the *Gitxsan* culture, it is important to know about the *adaawk* and the *ant’imalhlasxw*. This is essential in order to respect the property of others. The *adaawk* of the *Gitxsan* are very important to the culture and society. The *adaawk* are personal bloodline histories of the *Gitxsan*. They tell about the house group, whose members are descended through a line of women; *adaawk* involve their stories, their crest and their territories. They tell of the past and of identity.”<sup>301</sup>

The Gitxsan (*People of the River Mist*) in British Columbia have a long history of protecting their traditional territories, which spans over 33,000 square kilometres of traditional territories, (*lax yip*), more than the size of Belgium. They speak *Gitxsanimx* with *Sim’algax* being its linguistic basis.<sup>302</sup> They claim the north and central Skeena, Nass and Babine rivers and their tributaries,<sup>303</sup> and their institutions are founded on natural law and respect for one another. In fact, part of the evidence admitted before Chief Justice McEachern in the *Delgamuukw* decision states that scientists believe that their ancestors migrated from Asia, possibly before or after the last great ice age, and they spread out south and west in search of liveable lands.<sup>304</sup>

The most important unit of society for the Gitxsan people is called the “*Wilp*”. The *Wilp* or House is based on kinship traced through the mother’s side; hence, inheritance of property is matrilineal since every person born of a Gitxsan is automatically a member of his or her mother’s

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<sup>301</sup> M. Jane Smith, *Placing Gitxsan Stories in Text: Returning the Feathers*. *Guuxs Mak’am Mik’Aax* (Ph.D. Dissertation, UBC Faculty of Education, 2004) at 50 [unpublished] [Smith].

<sup>302</sup> *Ibid.*, at 174. According to Smith, the Gitxsan people have two main dialects; the western and the northern dialects; citing The *Sim’algax* Working Group, 1998, she said that the language could go extinct in 50 years if precautions are not made to preserve and transfer the knowledge of the language.

<sup>303</sup> *Delgamuukw*, *supra* note 16 at 83.

<sup>304</sup> *Ibid.*, at 138.

House and clan. The father's side (*wilxsi'witxw*) also have significant roles to play in the society and each person has the right (*amnigwootxw*) to use a father's House lands for certain periods.<sup>305</sup>

The structural organization of the House locates *Wilp* as belonging to one of the four clans: *Lax Gibuu* (Wolf), *Lax Seel/Ganeda* (Frog), *Gisgahast* (Fireweed), and *Lax Skiik* (Eagle), and they are entrusted with the responsibility of protecting its power relationship (*daxgyet*). The stated purpose of the Gitxsan governance system is the internal management of their collective rights and they have expressed their preference to be governed by their hereditary chiefs as opposed to band councils imposed under the *Indian Act*.<sup>306</sup>

Importantly, the *Wilp* serves as the political unit for each house and they are represented by hereditary chiefs, (*Simgiigyet*) who though holding the highest authority within the society, are still subject to other "lesser" chiefs (also known as "wings of the chief") within the *Wilp* who hold equal powers as well as members composed of children and adults. This arrangement acts as a sort of check and balance to the exercise of the *Wilp*'s powers because as the spokesperson for other members, the *Wilp* controls the lands. Political decisions are legitimately arrived at within the feast hall. The head chief of a House is selected in a flexible process by elders of the house, and sometimes, by the head chiefs of the other Houses of the Clan.<sup>307</sup> When a House becomes too large or small to complete its Feast (*yukw*),<sup>308</sup> it merges or divides in order to create an amalgamated or new House. In order to ensure that they have females or sometimes, males to populate the House, new members are often adopted.<sup>309</sup> As custodians of the names, crests<sup>310</sup> and

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<sup>305</sup> *Ibid.*, at 246-7.

<sup>306</sup> Richard Daly & Val Napoleon, "A Dialogue on the Effects of Aboriginal Rights Litigation and Activism on Aboriginal Communities in Northwestern British Columbia" (2003) 47:3 *Social Analysis, the International Journal of Cultural and Social Practice* 108. See also, The Gitxsan Alternative Governance Model at page 6, online: <[http://www.gitxsan.com/old/images/stories/agmv\\_4.pdf](http://www.gitxsan.com/old/images/stories/agmv_4.pdf)>.

<sup>307</sup> *Ibid.*, at 254.

<sup>308</sup> Richard Overstall, "Encountering the Spirit in the Land: "Property in a Kinship-Based Legal Order," at 28 in John McLaren, Andrew R. Buck & Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2004), [Overstall], *Encountering the Spirit in the Land*. Also called the Potlatch, the *yukw* is where a lineage conducts the business of organizing or formalizing their socio-political and legal affairs.

<sup>309</sup> *Bedford & Workman, supra* note 211 at 36. Wampum 68 of the Iroquoian Great Law of Peace also provides for how members of other clans can also be adopted. In fact, members of various nations can also be adopted and according to Francis Jennings, one half of the ethnic composition of the Iroquois is from adopted peoples. See also, Francis Jennings, *The Ambiguous Iroquoian Empire* (New York: Norton, 1984). The practice of adopting members

territories of the Houses, the head chiefs have taken actions to assert title over their lands through legal actions, blockades, and now negotiation with the Crown for centuries.<sup>311</sup> When a head chief dies, he is replaced by a new chief who is usually a family member such as a nephew, niece, brother or sister. When no suitable successor is found, a caretaker chief from another house takes the chiefly name in trust, until a new chief is appointed.<sup>312</sup>

As evidenced from the political structure of the Gitksan people, they practice group-based, decision making, and the power to give consent is vested not in the *Huwilp* alone, but in the collective society. Their governance structure is highly decentralized but having a “very formal aspect of customary law nonetheless.”<sup>313</sup> This means they do not rely on any centralized system for enforcing their laws. They have different types of laws and formal ancient collectively owned oral history called *adaawk*<sup>314</sup> that governs them, and prior to making any decisions that affect that land and people, the entire community or a majority must consent to the action.

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into a House is also practiced by the Gitksan people as means of protecting the House crest, alongside with other practices.

<sup>310</sup> Val Napoleon, “Living Together: Gitksan Legal Reasoning as a Foundation for Consent” in Jeremy Webber and Colin M. Macleod, eds., *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press 2010) [Napoleon: Living together]. According to Napoleon, the crest or *ayuuk* is a part of the Gitksan cultural foundation and is “a specific named power or privilege drawn from the *adaawk* that may be represented on poles, robes, regalia, headdresses, or other objects.” See also, Margaret Anderson & Marjorie Halpin, eds., *Potlatch at Gitsegukla: William Beynon’s 1945 Field Notes* (Vancouver: UBC Press, 2000) [Anderson & Halpin] at 17, cited in Napoleon: Living together, that the crest is so important that when Houses become smaller in size or their crests is not well taken care of; other Houses could disregard or even annex their rights. Further, according to Susan Marsden, “Defending the Mouth of the Skeena: Perspectives on Tsimshian Tlingit Relations” in Jerome S. Cybulski, ed., *Perspectives on Northern Northwest Coast Prehistory* (Hull: Canadian Museum of Civilization, 2001) 61 at 62-63. The *adaawk* connects Houses and their territories and it also defines their lands and resources.

<sup>311</sup> Historica Canada, online:< <http://www.thecanadianencyclopedia.ca/en/article/gitksan/>>. One of the first recorded territorial dispute by the Gitksan people was in 1872 during the Skeena Rebellion in British Columbia. They blockaded the Skeena River where traders and miners in Gitsegukla had destroyed eleven village longhouses and thirteen totem poles. Through their chiefs, they attempted to negotiate compensation for the affected families and met with Lieutenant-Governor Joseph Trutch. They also met with Prime Minister Wilfrid-Laurier in 1908 to discuss their title claims to their traditional territories in northwestern B.C.

<sup>312</sup> *Delgamuukw*, *supra* note 16 at para 273.

<sup>313</sup> Napoleon: Living together, *supra* note 310 at 16.

<sup>314</sup> *Smith*, *supra* note 301 at 50. According to Smith, one cannot write or talk about the *adaawk* of another house because they are personal properties of each house group. This means that the use of *ayuxws* (crests) of another house by an artist can only be permitted by the chief who owns the story.



Individuals represent each house and actions taken by any individual are the collective responsibilities of the house to which he belongs.<sup>315</sup> This does not mean that each and every member must consent to an action or political decision because in every community, there would almost always be a minority dissent and membership disputes.<sup>316</sup> However, the Gitxsan people are able to come to a decision through deliberation in a non-coercive form whereby no single person has the final power to make the final decision.<sup>317</sup>

Since time immemorial, the Gitxsan people have managed themselves and resolved disputes within and outside houses, as well as litigated cases to protect and preserve their culture and territories. *Delgamuukw* is one of the most successful results of how the Gitxsan peoples have asserted title over their ancestral lands. Though they were not granted title to the 58,000 square kilometres of total claimed ancestral territory (including the Wet'suwet'en claimed area), the decision is highly significant to all Indigenous peoples in Canada. Relying on the conclusions made from the doctoral thesis work of Indigenous legal scholar Val Napoleon, her review of about twenty Gitxsan legal cases reveals that there are five stages of managing disputes. They are:

- 1) Sort out the relationships and the breadth of history of each relationship (personal, political, legal and economic);
- 2) Engage in horizontal consultations with Houses that have an interest in the outcome of the dispute, and where necessary, with a neutral House;
- 3) Figure out precedents for similar disputes;
- 4) Develop an agreement among those involved with the dispute and those consulted; and

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<sup>315</sup> Napoleon: Living together, *supra* note 310 at 13.

<sup>316</sup> Ash Kelly & Brielle Morgan, "Divide and Conquer: The Threatened Community at the Heart of the PNW LNG project", *DesmogCanada* (July 6, 2016) online: <<https://www.desmog.ca/2016/07/06/divide-and-conquer-threatened-community-heart-pnw-lng-project>> Often, disputes arise when some minority members do not agree with the group's collective decisions, and often, non-Indigenous governments will take that advantage to deal with those dissenting minority. For example, as a result of the Pacific NorthWest LNG project on Lelu Island in B.C., some members of the Lax Kw'alaams group have received threatening messages because they disapproved or approved the project. One house leader, Murray Smith, of the Gitwilgyoots Tribe also says that the PNW LNG proponents have taken advantage of the internal disputes to coerce them into signing agreements that will give them money in exchange for their consents.

<sup>317</sup> Napoleon: Living together, *supra* note 310 at 45.

5) Explain the process publicly, usually at a Feast.<sup>318</sup>

Since these steps have proven to work over time, government and third parties wishing to do business with Gitxsan nation should take these steps into consideration, alongside any consultation policies in the use and management of resources on their traditional territories. The suggestion is not that these steps will apply to all Indigenous groups nationwide; however, if it has successfully worked for some groups, it may be highly reflective of other Indigenous groups' dispute resolution mechanisms.

## II. *The Band Council*

Section 74 of the *Indian Act*<sup>319</sup> establishes the Band Council, which has seen some resistance by some Indigenous groups as an intrusion on their right to self-government.<sup>320</sup> With regards to the Gitxsan peoples, they have challenged the application of the Act as an imposition on their

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<sup>318</sup> Valerie Ruth Napoleon, "Ayook: Gitksan Legal Order, Law, and Legal Theory" (Ph.D. Dissertation, UVic Faculty of Law, 2009, [Val Napoleon: Ayook, Unpublished]. Napoleon said that the reasons why outsiders as well as Gitxsan peoples undermine the Gitxsan conflict management mechanisms is due to their colonial history, which is best understood within the power relationships between the Gitxsan peoples and Canadian government.

<sup>319</sup> The *Indian Act*, R.S., c. 1-6. First enacted in 1876, the *Indian Act* sought to regulate every aspect of the day to day life of Indigenous peoples. In 1969, the federal white paper called for the repeal of the *Indian Act* but this was resisted by Indigenous peoples not because they approved of the provisions of the Act, but because it purported to end the special privileges that were accorded to them. In 1982, section 35 of the *Constitution Act, 1982*, came into force guaranteeing the "existing Aboriginal and treaty rights" of Aboriginal peoples of Canada. This constitutional provision, alongside the *Inherent Right Policy*, 1995, recognizes that Aboriginal peoples have special rights to title and self-government. For more, see Indigenous and Northern Affairs Canada, online: <<http://www.aadnc-aandc.gc.ca/eng/1100100014174/1100100014179>>.

<sup>320</sup> The *Gitxsan Alternative Governance Model*, *supra* note 306 at 5. This model was devised to serve as a Gitxsan-specific approach to future negotiations with the federal and provincial government when little progress was realised after more than a decade of negotiation. At page 3, the Gitxsan say they are not interested in a "parallel status" and that they want an end to the application of the *Indian Act* including the Band governance structure imposed upon them under section 74 of the Act. The Gitxsan people believe that the Act has made the Gitxsan villages dependent and impoverished. See also, David Schulze, "Comparative Governance Structures among Aboriginal Peoples in Canada" at 16 (January 2008), The Scow Institute, pdf online: <[http://scow-archive.libraries.coop/library/documents/Comparative\\_Governance.pdf](http://scow-archive.libraries.coop/library/documents/Comparative_Governance.pdf)>

existing governance structure which they assert has served them for generations, and they want it eradicated completely.<sup>321</sup>

The band council system is irreconcilable with Indigenous systems of government because it subjects the powers of the elected councillors to the Minister of Indian affairs.<sup>322</sup> For example, the *Indian Act* imposes the keeping of a register for membership and elections to determine band leaders. As a result, instead of the band council imposed by the Act, the Gitxsan peoples have suggested that “an elected group of observers” should be created to oversee their hereditary chiefs.<sup>323</sup> Usually, hereditary chiefs are elected to become members of the band council, but this is often not the case.

In terms of composition of the band, the Act provides that a band council shall consist of one chief and one councillor for every one hundred members of the band, but not less than two or more than twelve.<sup>324</sup> It also states that no band shall have more than one chief. The band councils are akin to elected public officials who govern day to day functions such as health, education and welfare of its members. Today, the band council has been replaced with the Gitxsan-Wet’suwet’en Education Society and the Gitxsan-Wet’suwet’en Government Commission.

#### **4.5.1. The Gitxsan Legal Traditions as an Example for Seeking Indigenous Consent**

Aside from the right to make decisions regarding their lands and resources, another right that is equally dear to many Indigenous groups worldwide is the right to participate in formulating policies and laws that govern their lands and culture. Before the assertion of Crown sovereignty in 1846, the Gitxsan peoples governed themselves according to their laws and traditions, and they continue to do so.<sup>325</sup> After 1846, Indigenous peoples in Canada became introduced to

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<sup>321</sup> Gitxsan, “Gitxsan History of Resistance”, online: <<http://www.gitxsan.com/culture/culture-history/gitxsan-history-of-resistance/>>

<sup>322</sup> *Ibid.*,

<sup>323</sup> *Ibid.*, at 6.

<sup>324</sup> See section 74(2) of the *Indian Act*.

<sup>325</sup> *Delgamuukw*, *supra* note 16 at para 63.

foreign body of laws and legal procedures, and as such, are required to make arduous claims to prove their existing rights based on foreign court rules and law. The same goes for existing consultation laws.

Several past and present consultation policies have been fashioned without taking Indigenous legal traditions on decision making into perspectives. The result is that negotiation becomes prolonged and often ends up impasse. Unfortunately, the courts are not left out of this nuanced crunch. Because most Canadian judges are not trained in Indigenous laws and customs, they are unable to comprehend the complex nature of the laws and this also results in erroneous decisions.<sup>326</sup> Indeed, this and several other issues form the very bane and threat to the existence of Indigenous legal traditions and laws in Canada such that every time a right is claimed, the courts are tasked with the role of evaluating the claimed right in light of pre-sovereignty practice and then translate that practice into modern legal right.<sup>327</sup>

Further, because of the historical domination of settler societies in Canada, Indigenous laws have become almost invisible in mainstream societies, and it is highly debatable that a full recovery from the incidents of colonization could occur.<sup>328</sup> For instance, in British Columbia, Aboriginal title was said to be extinct, yet, Indigenous peoples remained on the same lands they have been for over 10,000 years and retained their cultural practices.<sup>329</sup> What is the way forward?

The courts have said it is reconciliation. Education also plays an important role in enlightening non-Indigenous people. For instance, it should be understood that previous habitants or dwellers had their laws and ways of governing their resources and people, and that those laws still exist today and should be highly instrumental in determining how others may encroach on Aboriginal title lands. Indeed, when Indigenous peoples' right to self-government is respected, the freedom to use their land and to consent to third party's use of same will not be as debatable as it is today.

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<sup>326</sup> Napoleon: Living together, *supra* note 310 at 23. Citing *Lax Kw'alaams v Minister of Forests & West Fraser Mills* (2004), B.C.S.C. 420 that the court was unable to appreciate the political and legal institutions of the Tsimshian peoples and their claims.

<sup>327</sup> *R v Marshall; R v Bernard*, *supra* note 183 at 48. The SCC held that aside from considering the pre-sovereignty practice from Aboriginal perspectives, it must also consider European perspectives in deciding whether Aboriginal practices correspond to the legal rights claimed.

<sup>328</sup> *Ibid.* at 5.

<sup>329</sup> Kew & Miller, *supra* note 287 at 51.

The fact that it is even debatable is a very vexing issue to some Indigenous groups in Canada, and the new legal order in which they have been forced to live and abide with, is not voluntarily as of choice. This is supported by the skeptical view of David Hume where he writes that “almost all the governments which exist at present...have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent or voluntary subjection of the people.”<sup>330</sup>

The Gitxsan Nation is an example of a people who are able to manage themselves effectively as a decentralized, non-state people,<sup>331</sup> and the *Delgamuukw* decision is an example of one of their many successes. Where Indigenous groups have demonstrated the capacity to govern themselves as they have done successfully from time immemorial, governments or third parties wanting to develop projects on their lands should look to their laws and traditions and consult with them according to these laws.<sup>332</sup> That is the very nature of democratic principle of a sovereign nation, and Indigenous nations are a sovereign nation living within another nation.

#### **4.5.2. The Problem of Identifying Indigenous (Gitxsan) Decision-Makers**

Some Indigenous governance structures, for example, the Gitxsan governance structure, are designed such that outsiders not privy to its cultural practices will find it complex or difficult to assess the interactions between each of its organizations. One reason might be to avoid a chief or band councillor becoming dictatorial.<sup>333</sup> However, some Indigenous groups have elected representatives, elders or hereditary chiefs who have been democratically elected or who have

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<sup>330</sup> David Hume, “Of the Original Contract” in David Hume, *Essays: Moral, Political and Literary* (London: Oxford University Press, 1963) 452 at 457, 458, 460, cited in Jeremy Weber, “The Meaning of Consent” in Jeremy Webber and Colin M. Macleod, eds., *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press 2010) at 3.

<sup>331</sup> *Napoleon: Ayook*, *supra* note 318.

<sup>332</sup> Smith, *supra* note 301 at 45-7. A prominent Gitxsan educator and story-teller, the author warns against “orientalism.” According to Smith, orientalism is when outside researchers report on Gitxsan laws as if they were the authority on the culture without having the understanding that comes from the language. Likewise, it is easy for government and third parties to become orientalist if consultation policies are formulated without Indigenous perspective on negotiation and decision making.

<sup>333</sup> Gitxsan Nation, “the Wilp”, online: <<http://www.gitxsan.com/about/our-way/the-wilp/>>.

traditionally represented the group from time immemorial. For example, the Métis Nation of Ontario clearly mandates that consultation should only be carried out through their democratically elected representatives.

The problem of identifying Indigenous decision-makers can also be seen in case law. For example, in *Delgamuukw*, the Crown raised objections regarding the proper parties to commence legal action on behalf of the groups. Reluctantly, the Court held that the defect in pleading caused the Crown to suffer some prejudice, and that this necessitated a new trial due to the importance of the case.<sup>334</sup> Also, in *Tsilhqot'in Nation*, a similar issue arose regarding how authorized decision-makers within a claiming group may be recognized for the purposes of knowing whether or not they were acting on behalf of themselves or the nation. The Court held that the nation holds the collective interest in the land, therefore, all hereditary chiefs must authorize the action. It is suggested that these issues can be avoided if decision-makers are formally identified as persons having the authority to make decisions regarding land and other related matters on behalf of a community or nation. The *Indian Act* for instance, makes provisions for how chiefs and councillors may be elected.<sup>335</sup>

In response to the leadership problem evident in the *Delgamuukw* decision, the Gitxsan Treaty Society (the “GTS”) was formed with a mandate to represent the Gitxsan nation in negotiation of treaties with the Crown and benefits agreements with developers. However, the GTS has suffered several setbacks and internal divisions because some hereditary chiefs (the United Gitxsan Chiefs) have voiced their oppositions to the activities of the GTS, saying that they do not recognize them as their authorized decision-makers.<sup>336</sup> The issue became so contentious that it led to protesters seizing the office of Chief Elmer Derrick who was to endorse the Enbridge

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<sup>334</sup> *Delgamuukw*, *supra* note 16 at paras 73-77.

<sup>335</sup> See section 74(3) of the *Indian Act*. The problem with locating Indigenous leaders within the Act is that sometimes, government would often refuse to negotiate or initiate consultations with Indigenous leaders who are not band councillors. This is a deep disrespect to Indigenous peoples and their rights to self-government. In fact, Harry Swain joins his voice with that of most Indigenous bands nationwide to advocate for alternatives to the Indian Act. Harry Swain, “Paths to reconciliation in the post-Tsilhqot'in world”, *supra* note 209 at 7-8.

<sup>336</sup> *Spookw v Gitxsan Treaty Society*, *supra* note 297. See also, Gordon Hoekstra, “Gitxsan displeased with pipeline offer made directly to hereditary chiefs” in the *Vancouver Sun*, (July 22, 2014), online: <<http://www.vancouversun.com/technology/Gitxsan+displeased+with+pipeline+offer+made+directly+hereditary+chiefs/10050385/story.html>>.

Project, for eight months until the court ordered him restored back in office.<sup>337</sup> The drastic steps taken in this case sends a clear message to government and third parties wishing to deal with Indigenous leaders that they must consult directly with the community members because elected officials holding political offices may not necessarily be the authorized decision makers for the community.

The Gitxsan nation's model of governance is an example out of several other Indigenous groups that is highly structured and established in terms of decision-making for its people. It becomes imperative for third parties wishing to do business on Indigenous title lands to endear themselves to the particular groups' cultural practices with the goal of aligning their consultation policies with the Indigenous groups' existing cultural practices. In the end, it is only through negotiated agreement (in the form of consent) that settlement of issues over Aboriginal lands can be reached.

#### **4.6. Forging Ahead as Shared Decision-Makers: Government and Indigenous Leaders**

Many Indigenous leaders nationwide agree that in order to achieve reconciliation, new relationships must be forged with the Governments of Canada. On September 10, 2015, the Government of British Columbia reaffirmed its promise to advance reconciliation with Indigenous peoples through a proposed joint work plan with the First Nations Leadership Council. This is in furtherance of ongoing commitments heralded by the decisions in *Haida Nation*, *Taku River*, and *Mikisew Cree FN*, whereby the government committed to a new relationship in 2005 based on the following three principles:

- Respect, recognition and accommodation of Aboriginal title rights;
- Respect for each other's laws and responsibilities; and

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<sup>337</sup> Dirk Meissner, "Northern Gateway Pipeline: Elmer Derrick Lone B.C. Chief to back Enbridge deal amid overwhelming opposition" *Huffington Post*, (January 15, 2012) online: [http://www.huffingtonpost.ca/2012/01/15/northern-gateway-pipeline-enbridge\\_n\\_1207196.html](http://www.huffingtonpost.ca/2012/01/15/northern-gateway-pipeline-enbridge_n_1207196.html).

- The recognition of Aboriginal and Crown titles and jurisdictions.<sup>338</sup>

According to the B.C. government, the New Relationship accord is reflective of SCC decisions and envisions principles that will allow for “improved government-to-government relations with First Nations.” It is hoped that the initiative will foster “reconciliation of Aboriginal and Crown titles and jurisdictions”<sup>339</sup>, as well as improve the lives of Indigenous peoples within the province.<sup>340</sup> In order to achieve the goal of a new relationship, both parties recognized that it is important to include Indigenous groups in decision-making on issues that will affect their rights and communities.

In 2009, a “Discussion Paper on Instructions for Implementing the New Relationship” (the “Discussion Paper”) was issued whereby parties agreed that shared decision-making is an incident of the recognition of the existence of aboriginal title and the right to self-government. As such, the New Relationship vision envisages initiatives and legislative enactment of regulations that will promote shared decision-making between the two governments.<sup>341</sup>

According to the Discussion Paper, shared decision-making will include Indigenous peoples in making decisions that affect their land and resources which in turn will harmonize the two governments and foster relationships based on trust by righting historical wrongs. For example, while fulfilling its duty to consult, the Province cannot unilaterally impose processes for making decisions or reaching agreements that will only allow Indigenous peoples to fit into its existing policies and legislations. The Province must also acknowledge that Indigenous peoples have their own laws and ways of making decisions that affect their land and resources which in turn

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<sup>338</sup> Government of British Columbia, “New Relationship” (2005), online: <http://www2.gov.bc.ca/gov/content/governments/aboriginal-people/new-relationship>>. See also, Government of British Columbia, “Proposed Commitment Document 2015”, online: <http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/reconciliation-other-agreements>>.

<sup>339</sup> *Ibid.*, at 4.

<sup>340</sup> *Ibid.* According to the B.C. government, the New Relationship accord has yielded some positive fruits, which shows the contributions that a positive and healthy relationship can produce. Some of the positive outcomes that have been recorded as of July 2013 include: completion of 8 final treaty agreements; partnering with First Nations government on joint land-use agreements, revenue-sharing, and economic benefit agreements; and the introduction of Incremental Treaty Agreements.

<sup>341</sup> Discussion paper on Instructions for Implementing the New Relationship. [The “Discussion Paper”].



must be included in the provincial consultation laws. If existing laws do not reflect this, as the *Guideline* shows, then changes must be made in order to reflect the parties' goal of building new relationships through shared decision-making,<sup>342</sup> and this should include providing funding to Indigenous governments where necessary.

Further, the discussion paper suggests some models of shared decision-making for both parties to follow to ensure smooth project execution. Since many stakeholders believe that not knowing the precise nature of their accommodation duties is "one of the most vexing dimensions of the duty to consult doctrine,"<sup>343</sup> it is only logical to become familiar with Indigenous decision-making systems in order to meaningfully reach an agreed decision. When properly executed, shared decision-making can ensure stability and certainty in land and resource development projects within the province because Indigenous perspectives will have been considered and their approval of such projects will have been sought and obtained during the process.<sup>344</sup>

A new relationship that evinces respect for Indigenous peoples will mean that agreements reached at negotiation are fully implemented and not entered under coerced atmosphere. It is almost impossible to build new relationships and achieve certainty in resource development when new methods are devised in obtaining old, renounced results. The rights of Indigenous peoples who refuse to cede or surrender their title to land or enter into any form of benefits agreements should be respected. Because of the more recent demands for the recognition of their rights to give or withhold their consent to major developments on their lands, Indigenous peoples are no longer satisfied with mere relinquishment of some rights in land in exchange for modern treaty agreements. They want a declaration of title to their lands which will enable them enjoy the full incidents of Aboriginal title. To Indigenous peoples of Canada, consent is the new standard for fulfilling the duty to consult; it has become more realistic since the *Tsilhqot'in Nation* decision, and it will reflect a genuine step on the part of the government towards reconciliation.<sup>345</sup>

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<sup>342</sup> *Ibid.*, at 2.

<sup>343</sup> Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, *supra* note 5 at 104.

<sup>344</sup> *The Discussion paper*, *supra* note 341 at 5-7.

<sup>345</sup> British Columbia Assembly of First Nations, "Discussion Paper, Reconsidering Canada's Comprehensive Claims Policy: A New Approach Based on Recognition and Reconciliation" at 15, (Amended following the BCAFN Strategic

## 4.7. FPIC as a Standard for Meaningful Consultation

Free, Prior and Informed Consent (FPIC) is an international Indigenous right principle referenced throughout the UNDRIP but clearly elaborated under Article 32(2).<sup>346</sup> On many views, FPIC can be traced to the International Labour Organization (ILO) *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*.<sup>347</sup> Marcus Colchester and Fergus MacKay<sup>348</sup> have argued that the concept of FPIC can actually be traced to the 17<sup>th</sup> century as an integral element of negotiated settlements.<sup>349</sup> In any event, it was later adopted by the U.N. General Assembly in 2007 in the UNDRIP, which safeguards the rights of Indigenous peoples all over the world and guarantees that signatory States protect the collective rights of Indigenous peoples in addition to its domestic legislations, treaties and agreements.

According to Frank Vanclay and Ana Maria Esteves<sup>350</sup> FPIC can be described as:

- **Free:** “that there must be no coercion, intimidation or manipulation by companies or governments, and that should a community say ‘no’ there must be no retaliation”
- **Prior:** “that consent should be sought and received before any activity on community land is commenced and that sufficient time is provided for adequate consideration by any affected communities”
- **Informed:** “that there is full disclosure by project developers of their plans in the language acceptable to the affected communities, and that each community has enough

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Dialogue Session, May 9-10, 2013) (June 26, 2013), online: <[http://www.afn.ca/uploads/files/sc/comp\\_bcafn\\_chiefs\\_ccp\\_discussion\\_guide\\_-\\_revised\\_july\\_16\\_2013\\_\(final\).pdf](http://www.afn.ca/uploads/files/sc/comp_bcafn_chiefs_ccp_discussion_guide_-_revised_july_16_2013_(final).pdf)>.

<sup>346</sup> UNDRIP, *supra* note 2.

<sup>347</sup> See Articles 6 & 16 (2) of the International Labour Organization (ILO) *Indigenous and Tribal Peoples Convention: C169*. (1989), Geneva: 76<sup>TH</sup> ILC session.

<sup>348</sup> Marcus Colchester and Fergus Mackay, “In search of the Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent” at 8 (August, 2004), paper presented to the 10<sup>th</sup> Conference of the International Association for the Study of Common Property Oaxaca, online: <<http://www.forestpeoples.org/sites/default/files/publication/2010/08/fpicipsaug04eng.pdf>> .

<sup>349</sup> *Ibid.*, at 3, where the Middle Ground was said to have been “created because both parties (Indigenous peoples and colonial entrepreneurs of the 17<sup>th</sup> and 18<sup>th</sup> centuries) wanted to trade, neither had a monopoly on power, and they had to find mutually intelligible and acceptable means of dealing with each other.”

<sup>350</sup> Frank Vanclay and Ana Maria Esteves, “Current issues and trends in social impact assessment” in *New directions in social impact assessment: conceptual and methodological advances*, (Cheltenham, Edward Elgar Publishing: 2011) at 6-7.

information to have a reasonable understanding of what those plans will likely mean for them, including of the social impacts they will experience” and

- **Consent:** that communities have a real choice, that they can say yes if there is a good flow of benefits and development opportunities to them, or they can say no if they are not satisfied with the deal, and that there is a workable mechanism for determining whether there is widespread consent in the community as a whole and not just a small elite group within the community.”<sup>351</sup>

Notwithstanding the above definition, the implication of FPIC principles is still shrouded in ambiguities when it comes to its nature, interpretation and scope, and some have interpreted FPIC as vesting veto power in Indigenous groups.<sup>352</sup> It could be argued that the right to FPIC is synonymous to a veto, but in Canada, the SCC is clear that the process of consultation and accommodation does not translate to giving Aboriginal groups a veto over what can be done with land pending final proof of the claim. More specifically, the court held that “the Aboriginal consent spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.”

Different views have been proffered by several scholars with regards to the interpretation of FPIC. However, this thesis takes the view that FPIC would fail to achieve its purpose if it is boxed up as a veto power reposed to Indigenous groups. It is suggested that FPIC should be liberally interpreted to allow for the emergence of the literal meanings of what each word connotes as defined by Vanclay and Esteves above. This view is consistent with that of several writers, including Sébastien Grammond, who opines that FPIC should be pursued as a goal rather than perceived as a “veto power” reposed in Indigenous peoples.<sup>353</sup> Consistent with the views of

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<sup>351</sup> Philippe Hanna and Frank Vanclay, “Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent,” (2013) Impact Assessment and Project Appraisal, Vol. 31, No. 2, 146–157, (Hanna and Vanclay) online: <<http://www.tandfonline.com/doi/pdf/10.1080/14615517.2013.780373>>.

<sup>352</sup> James Anaya, “Indigenous Peoples’ Participatory Rights in Relation to Decisions about Natural Resource Extraction: the more Fundamental Issue of what Rights Indigenous Peoples have in Lands and Resources,” (2005) 22 Ariz.J.Int’l & Comp. L. 7 at 2.

<sup>353</sup> Grammond, *supra* note 25 at 165

Grammond, this thesis argues that FPIC should be approached as an overarching goal of consultation.<sup>354</sup>

The views of Dwight Newman with regards to UNDRIP, including the FPIC concept is that it is possible for Canadian courts to gradually accept the provisions of the Declaration if treated as an aspirational document.<sup>355</sup> However, some writers have taken the position that FPIC should be viewed more as a philosophy than a legal procedure and that where a resource project is likely to affect Indigenous groups, “their views should be considered and respected, regardless of the national legislation requirements.”<sup>356</sup> The problem with this view is that it still does not guarantee that Indigenous consent would be obtained prior to proceeding with resource developments on their lands.

Further, Hanna and Vanclay’s philosophical view of FPIC appear to be the current state of law in Canada since FPIC remains an aspirational philosophy that has not been legislated by Parliament. When it comes to applicability, FPIC is not binding in Canada; however, its legal status has been discussed in some court decisions. For example, in *Sackaney v. R.*,<sup>357</sup> the court held that because UNDRIP is yet to be ratified by Parliament, it does not give rise to any substantive rights in Canada.<sup>358</sup> As such, in the absence of any national legislative requirement of FPIC, the Crown is bound only by the constitutional duty to consult, which remains the valid law when dealing with Indigenous peoples.

Notwithstanding FPIC’s non-binding status in Canada, some proponents have been consulting with Indigenous groups for the purpose of seeking their consent to proposed projects on their lands.<sup>359</sup> According to Martin Papillon and Thierry Rodon, the approach taken by these project proponents has many advantages, notably in helping to facilitate stable, substantial relationships between proponents and communities. They also suggest that this approach “offers a truncated

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<sup>354</sup> *Ibid.*,

<sup>355</sup> Newman, “Revisiting the Duty to Consult”, *supra* note 5 at 151.

<sup>356</sup> Hanna and Vanclay, *supra* note 351 at 152.

<sup>357</sup> *Sackaney v. R.*, *supra* note 18.

<sup>358</sup> *Ibid.*, at 35.

<sup>359</sup> Martin Papillon and Thierry Rodon, “Proponent-Indigenous agreements and the implementation of the right to free, prior and informed consent in Canada,” *Environmental Impact Assessment Review* 62 (2017) 216–224 at 216.

version of FPIC from the perspective of the communities involved.”<sup>360</sup> This last statement is partly supported by this thesis in light of the view that through impact and benefits agreements, Indigenous approval to projects is sought and obtained in the form of a contractual agreement. However, this thesis argues that FPIC principles is different from the types of contractual agreements entered into with Indigenous communities because by definition, FPIC entails the right to freely give or withhold from consenting to a project, while in some cases, the law would mandate that IBAs must be negotiated. Further, IBAs and FPIC have different goals in that IBAs focuses more on issues related to economic compensations while FPIC’s focus is much broader, ranging from economic, cultural, spiritual and traditions values of the affected groups.<sup>361</sup>

Due to the serious implications of FPIC to Indigenous peoples’ rights, many Indigenous group leaders now demand that both the federal, provincial and territorial governments legislate the UNDRIP principles “as the new norm” in Canada’s consultation policies and guides.<sup>362</sup> This has been done by some countries, for example, the Philippines and Venezuela, where consent has been legislated as a domestic law.<sup>363</sup> These steps are commendable and should be emulated by other signatory States; however, legislating consent is merely formalizing Indigenous peoples’ rights. It is more important to the right-holders that consent is implemented through observance of the rule of law as opposed to what has been described as a “box-ticking” procedure.<sup>364</sup> According to Joji Carino, although consent has been legislated in the Philippines,<sup>365</sup> the issue of Indigenous peoples’ consent has been the subject of bribery or coercion and tension continues to mount around mining sites all over the country, thereby leading to increased military presence in order to secure mining sites.<sup>366</sup> Carino concludes that these issues are indicative of the failure of project proponents to obtain the FPIC of the affected Indigenous communities, thereby rendering

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<sup>360</sup> *Ibid.*,

<sup>361</sup> *Ibid.*, at 217 and 220.

<sup>362</sup> *Ibid.*, at 20.

<sup>363</sup> Sasha Boutilier, “Free, Prior and Informed Consent and Reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples” (2017) UWO J Leg Stud Vol 7 Iss 1, Article 4 at p 4: online: <<https://ir.lib.uwo.ca/uwojls/vol7/iss1/4/>> (Sasha Boutilier).

<sup>364</sup> Hanna and Vanclay, *supra* note 351 at 152. See also,

<sup>365</sup> Republic of the Philippines, *The Indigenous Peoples’ Rights Act of 1997*, Republic Act No. 8371 (1997), <<http://www.gov.ph/1997/10/29/republic-act-no-8371/>>

<sup>366</sup> Joji Carino, “Indigenous Peoples’ Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice” (2005) *Ariz J Int Comp L* 22(1) 19-39 at 39.

the true meaning of consent redundant. Therefore, in order to realize the objectives of FPIC, “surface level change”<sup>367</sup> is not sufficient; States must commit to ensuring that when locally legislated, the goals of FPIC is achieved through adherence to their laws. While waiting on the government to change its approach to consulting with them, Indigenous peoples have now recognized the need to develop their own policies based on the UNDRIP principles.<sup>368</sup>

#### 4.7.1. FPIC and Consent Issues in Canada

The provision of UNDRIP that best articulates the FPIC principle is found in Article 32(2), which states that:

“States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”<sup>369</sup>

Article 32(2) has been interpreted in several ways including that it provides Indigenous peoples with a right to veto a project before it can successfully take-off. Unfortunately, this interpretation is misleading while resulting in the very opposite of what the UNDRIP instrument was fashioned to achieve.<sup>370</sup> In *Little Salmon/Carmacks First Nation*, the court held that the First Nation did not have a veto over the approval process” because “no such substantive right is found in the treaty or in the general law, constitutional or otherwise.”<sup>371</sup> As such, where carefully interpreted, FPIC

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<sup>367</sup> *Ibid.*,

<sup>368</sup> The Simpcw First Nation Heritage Policy, (September 2015), online at: <[http://www.simpcw.com/docs/sfn\\_heritage\\_policy\\_final\\_sept\\_2015.pdf?LanguageID=EN-US](http://www.simpcw.com/docs/sfn_heritage_policy_final_sept_2015.pdf?LanguageID=EN-US)>. This Policy relies on SCC jurisprudence and UNDRIP and stipulates in its Policy that “express consent from Simpcw is required before any Heritage Work is conducted within Simpcwulécw, or any Simpcw Heritage Object is removed from Simpcw Heritage Site or a Simpcw Heritage Site or Heritage Object is damaged, altered or destroyed.”

<sup>369</sup> Article 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 2.

<sup>370</sup> Julianne Hazlewood “UN Declaration will allow pipeline veto: N.B. Aboriginal leaders” CBC News, (May 11, 2016), online: <<http://www.cbc.ca/news/canada/new-brunswick/un-declaration-energy-east-pipeline-veto-1.3576710>>.

<sup>371</sup> *Little Salmons/Carmacks First Nation*, *supra* note 52 at para 14.

implies informed consent obtained through Indigenous people's representative government or leadership, and it has been suggested by Grand Chief Edward John that this should be the Canadian standard for meaningful consultation.<sup>372</sup>

Another misconception about FPIC is that it is incompatible with Canadian law namely, the constitutional duty to consult, and that it creates a special right for Indigenous peoples in Canada, especially considering the existence of treaties nationwide. According to Sasha Boutilier, and consistent with this thesis' position, and that of Anaya, this should not be a hindrance to implementing FPIC.<sup>373</sup> Rather, government should focus more on the impact of consent as the standard for consultation with Indigenous communities, as opposed to focusing on the interpretation of these treaties and how they affect implementation of consent.<sup>374</sup> Further, the argument that consent or FPIC grants special rights to Indigenous peoples is not factual because FPIC is not a special right. Rather, FPIC should be recognized as a human right of Indigenous peoples due to the recognition that they first occupied the lands prior to the arrival of European settlers in Canada. Further, Anaya suggests that Indigenous peoples' right should include the right to have access to all relevant information in order to make their independent decision free of threat, intimidation and duress.<sup>375</sup>

Canadian jurisprudence provides that the fundamental objective of the modern law of Aboriginal and treaty rights (including the government's duty to consult) is the reconciliation of Crown and Aboriginal claims, interests and ambitions.<sup>376</sup> Implicitly, when reconciliation is the main goal of negotiating parties during consultation, it is easy to reach consensual agreements. As a primary goal of consultation, reconciliation should acknowledge Indigenous rights to freely consent to any developments on their lands. It should be the goal of every consultation participant, and the

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<sup>372</sup> Grand Chief Edward John, Akile Ch'oh, "Series – First Nations' Rights: The Gap between Law and Practice, Consent or Consultation: Examining the Gap" (Vancouver: January 30, 2014), online: <http://www.lrwc.org/ws/wp-content/uploads/2014/05/Chief-John-Powerpoint.pdf>.

<sup>373</sup> Sasha Boutilier, *supra* note 363 at 9.

<sup>374</sup> *Ibid.*, See also, James Anaya, Report to the Human Rights Council, A/HRC/12/34, (14 July 2009), at 21 [Anaya].

<sup>375</sup> James Anaya, *International Human Rights and Indigenous Peoples* (New York: Aspen Publishers, 2009) at 63 [Anaya: *International Human Rights and Indigenous Peoples*]. See also, Fact Sheets on Indigenous Peoples and Free, Prior and Informed Consent online: [https://www.amnesty.ca/sites/amnesty/files/fpic\\_factsheet\\_nov\\_2013.pdf](https://www.amnesty.ca/sites/amnesty/files/fpic_factsheet_nov_2013.pdf).

<sup>376</sup> Mikisew Cree, *supra* note 11 at para 1.

government should recognize and respect the constitutional rights of Indigenous peoples by sending negotiators who are able to make decisions that build relationships.<sup>377</sup> Importantly, consultation with consent in mind should be flexible and must acknowledge existing Indigenous decision-making processes and allow them to contribute their knowledge towards the consultation process.

The instances where consent is required have been broadly described in greater detail in chapter one of this thesis, however, for the purposes of giving more clarity to the relationship of consent as it relates to title lands, it will be discussed briefly in this section.

Consent is legally required in lands where title has been declared. Even when title is not established, good faith consultation should promote as a goal, the model of reaching consensual agreements in the form of consent. According to the Court in *Delgamuukw*, in some cases, “consultation may even require the full consent of an Aboriginal nation.”<sup>378</sup> For meaningful consultation leading to consent to occur; it must have been freely commenced and negotiated at the early stages of the project, and government and proponents must have provided the affected Indigenous communities with detailed information.<sup>379</sup> Article 19 of the UNDRIP requires that:

“States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

From the foregoing, some distinct keywords are used in reinstating the importance of consent from authorised Indigenous decision-makers during consultation. For consent in consultation to be free, elements of coercion or force must be absent;<sup>380</sup> it must have been sought at the incipient

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<sup>377</sup> Report of the Working Group, *supra* note 229 at 33-37.

<sup>378</sup> *Delgamuukw*, *supra* note 16 at 168

<sup>379</sup> *Haida Nation*, *supra* note 9 at 46.

<sup>380</sup> Report of the Working Group, *supra* note 229 at 56. Indigenous people are rejecting monetary offers when proponents offer large amounts of money in exchange for their consents to projects through benefit agreements. Some Indigenous communities have said they would not accept it because it is similar to inducements and buy-outs, which is an element of coercion. Some of the reasons for rejecting these offers are that the issues at stake are not “money issues,” whereby their consents could be bought. Rather, it is about the environment and preservation of their cultural practices. They now demand that consultation leading to agreements should be



stage of the project, and the Indigenous community members affected by the proposed project must have been fully informed about the project.

The concept of FPIC is also required when entering into legally binding agreements between Indigenous peoples and project proponents, such as an Impact and Benefit Agreement (IBA), modern treaties or self-government agreements, which are often the results of consultation and accommodation of rights. As a fundamental goal of consultation, reconciliation between Crown-Indigenous governments would trigger the need for the Crown to consult with Indigenous groups, which in turn would necessitate entering into contractual agreements such as IBAs, before the commencement of any project that may adversely affect Aboriginal and treaty rights. IBAs are advantageous and highly strategic in ensuring that Indigenous groups are included in resource development taking place on their lands. They also guarantee that the industry engage in consultation with Aboriginal communities and are able to accommodate their concerns regarding a project. This in turn ensures that the right environment that fosters strong relationship between the Crown and Indigenous groups is given the opportunity to thrive.

#### **4.7.2. The Application of FPIC in Canada**

The current status of UNDRIP in Canada is that it is a non-binding international instrument since no legislative action has been taken by the Parliament.<sup>381</sup> However, it is possible to legislate UNDRIP and the FPIC principles if the government intends to implement its provisions nationally. This is consistent with the views of Sasha Boutilier, that government can implement the FPIC standard for Environmental Assessment processes through legislation which can be achieved by use of the federal government's legislative authority over Aboriginals peoples under

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devoid of monetary inducements unless it is mutually agreed upon. See also, Christopher Donville & Rebecca Penty, "B.C. First Nation reject \$1.15 billion Petronas-led LNG deal: 'This is not a money issue'", in *Financial Post*, (May 13, 2015) online: <<http://business.financialpost.com/news/energy/b-c-first-nation-rejects-1-15-billion-petronas-led-lng-deal-this-is-not-a-money-issue>>. See further, MintPress News Desk, "Canadian First Nation People Reject \$960 Million from Big Oil" in *MintPress News*, (May 19, 2015) <<http://www.mintpressnews.com/canadian-first-nation-people-reject-960-million-from-big-oil/205789/>>.

<sup>381</sup> Indigenous and Northern Affairs Canada, "What is a United Nations Declaration?" online: <https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>>. See also, *Snuneymuxw First Nation V Board of Education – School District #68* (2014) BCSC 1173 at 59.

section 91 (24) of the *Constitution Act, 1867*.<sup>382</sup> This section provides for the powers of the Parliament and subsection 24 reserves exclusive legislative power with regards to “Indians and Lands reserved for the Indians.”<sup>383</sup>

Another way to ensure the legal validity of the UNDRIP provisions is to interpret its provisions as customary international. However, this can only be made possible if the courts and government were to adopt practices that will reflect FPIC or consent principles and are bound by those practices. According to existing jurisprudence, the closest we have to consent in Canadian law is the duty to consult. It is only when a rule or pattern of behaviour has acquired the prominence of state practice that it becomes customary international law.<sup>384</sup>

According to the provisions of Article 38(1) (b) of the Statutes of the International Court of Justice, the Court applies international custom “as evidence of a general practice accepted as law.”<sup>385</sup> James Anaya is of the view that a rule is said to be customary international law when a state reflects a pattern of behaviour that conforms to that rule and consents to be bound by it.<sup>386</sup> As such, customary international laws are reflections of domestic laws and vice versa. By implication, for UNDRIP provisions to be classified as customary international law in Canada, State practices and behaviours must reflect the principles declared in the instrument. The relationship between Canada’s domestic law and international principle was discussed in detail by the SCC in *R v Hape*, which provides some clarification as to the applicability of UNDRIP in Canada.

In *Hape*, the Court stated that common law jurisdictions take the adoptionist approach to the reception of customary international law, and this allows such prohibitive rules to be

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<sup>382</sup> *Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.), reprinted in RSC 1985, Appendix II, No. 5.

<sup>383</sup> *Ibid.*, at s. 91 (24).

<sup>384</sup> James Anaya, UN Special Rapporteur on the Rights of Indigenous Peoples, in General Assembly, *Situation of human rights and fundamental freedoms of Indigenous people: Note by the Secretary-General Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples*, UN Document A1651264 (August 2010).

<sup>385</sup> Article 28(1) of the United Nations, Statute of the International Court of Justice, (18 April 1946), online: <http://www.icj-cij.org/en/statute>.

<sup>386</sup> S. James Anaya, *Customary International Law*, (1998) 92 Am Soc’y Int’l L. Proc. 41 at 41. See also, Emily Kadens and Ernest A. Young *How Customary is Customary International Law?* (2012-2013) 54 Wm. & Mary L. Rev. 885; R. v Y. (N.) (2008) 77 W.C.B. (2d) 686 at 49.

incorporated directly into domestic law without the need for legislative actions.<sup>387</sup> This means that rules of customary international law are equated to common law rules so long as there is no valid domestic law that conflicts with the rules.<sup>388</sup> When applied to UNDRIP, this means that if the provisions of the UNDRIP are considered rules of customary international law, it would have direct application in Canada through the adoptionist approach, and should be equated to common law rules in Canada. In essence, Indigenous rights advocates of the principles enunciated under the UNDRIP must show that according to state practice, the duty to consult doctrine extends to a duty to obtain consent from Indigenous peoples when contemplating or approving projects on their traditional territories. By arguing that the government owes a duty to seek and obtain their free, prior and informed consent, Indigenous rights holders can demonstrate that the provisions of UNDRIP which talks about FPIC of Indigenous groups when contemplating any major dealings on their traditional territories, have become customary international law in Canada.

In 2010, the federal government issued a statement endorsing UNDRIP in a manner that is consistent with Canada's constitutional laws.<sup>389</sup> The statement of support that was issued came with a caveat - that the federal government's endorsement does not change Canadian laws; rather, where any UNDRIP principle, such as the FPIC principle, is inconsistent with Canadian jurisprudence, it would be void to the extent of the inconsistency. In effect, the position of the government is that Canadian jurisprudence on the duty to consult with Indigenous peoples was the law, and there was no duty to consent or reach an agreement.

Canada's position on UNDRIP changed significantly in 2016 when the Minister of Indigenous and Northern Affairs, Honourable Carolyn Bennett, announced the government's full support of the UNDRIP principles without qualifications.<sup>390</sup> Further, while attending the UN Permanent

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<sup>387</sup> *R v Hape*, 2007 SCC 26 at para 36.

<sup>388</sup> *Ibid.*, at 39. After considering the long silence by Canadian courts as regarding the approach taken towards the reception of customary international law, the Court went on to say that the doctrine of adoption has never been rejected in Canada.

<sup>389</sup> Indigenous and Northern Affairs Canada, Archived page- "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" online: <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>>.

<sup>390</sup> Indigenous and Northern Affairs Canada, "Canada becomes a full supporter of the United Nations on the Rights of Indigenous Peoples" (New York: May 10, 2016), online: <[http://news.gc.ca/web/article-en.do?nid=1063339&\\_ga=1.189572523.1682708395.1478355712](http://news.gc.ca/web/article-en.do?nid=1063339&_ga=1.189572523.1682708395.1478355712)>.

Forum on Indigenous Issues in 2016, Minister Bennett explained that “implementing UNDRIP should not be scary” since already, modern treaties and self-government agreements have FPIC undertones.<sup>391</sup>

Minister Bennett’s statement appears to be inconsistent with the SCC decision on the interpretation of modern treaties. In *First Nation of Nacho Nyak Dun v Yukon*, the Court made it clear that the role of modern treaties in advancing reconciliation is to address land claims dispute, which in turn, would create “the legal basis to foster a positive long-term relationship.”<sup>392</sup> Further, the Court stated that treaties must be interpreted “in light of the treaty texts as a whole and the treaty’s objectives,”<sup>393</sup> which in turn is anchored on the constitutional duty of the Crown to deal with honourably with Indigenous peoples. From the foregoing, it is clear that unlike the Minister’s statement, modern treaties do not have “consent undertones.” Except where explicitly stated, modern treaties must be interpreted according to the treaty texts and objectives only. Because obtaining consent is not a stated objective of modern treaty negotiations, Minister Bennett’s statement appears to be problematic and misleading.

Further, a progressive stage requiring consent from Indigenous claiming groups was laid by the SCC where there is a strong claim to title. According to the Court, where the government intends to use Indigenous land for resource development, it can avoid a charge of infringement by obtaining the consent of title-claimants.<sup>394</sup> This statement serves as a caveat to the government because the implication of discarding the warning when title is eventually established is that the project may be cancelled.<sup>395</sup> This part of the *Tsilhqot’in Nation* decision is being put to test in the Kinder Morgan Trans Mountain pipeline project in British Columbia.

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<sup>391</sup> Government of Canada, “Speech delivered at the United Nations Permanent Forum on Indigenous Issues”, *New York*: (May 10, 2016), online <[http://news.gc.ca/web/article-en.do?nid=1064009&\\_ga=1.121604360.1682708395.1478355712](http://news.gc.ca/web/article-en.do?nid=1064009&_ga=1.121604360.1682708395.1478355712)>.

<sup>392</sup> *First Nation of Nacho Nyak Dun v Yukon*, (2017) SCC 58 at 38.

<sup>393</sup> *Ibid.*, at 37.

<sup>394</sup> *Ibid.*, at 97.

<sup>395</sup> *Ibid.*, at 92.

In 2016, the Government of Canada approved the Kinder Morgan Trans Mountain Pipeline (TMPL) Expansion Project.<sup>396</sup> The TMPL is a \$6.8 billion construction project that would increase the pipeline's capacity from 300,000 to 890,000 barrels of oil per day, and add an approximate 980km of new pipeline. Most of the pipeline routes would be constructed on lands where Indigenous title is claimed. As such, the project has faced several oppositions from health and environmental activists, as well as from Indigenous groups who have filed judicial reviews of the government's decision at the Federal Court of Appeal in B.C.<sup>397</sup>

In approving the TMPL project, the government exercised its executive powers in deciding that there was no infringement because adequate consultation was undertaken in line with its commitment to renew the relationship with Indigenous peoples. Further, the federal government stated that in approving the TMPL, it remains committed to reconciliation while working in partnership to address issues that are important to Indigenous communities.<sup>398</sup> This test allows the government to override Aboriginal rights as long as there is a valid legislative objective that is exercised in line with its fiduciary obligations to Indigenous peoples. One of the conditions to

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<sup>396</sup> Alex Boutilier and Bruce Campion-Smith, "Liberals approve Trans Mountain pipeline, reject Northern Gateway Plan" in *The Star*. (November 29, 2016), online: <<https://www.thestar.com/news/canada/2016/11/29/liberals-approve-trans-mountain-line-3-pipeline-projects.html>>.

<sup>397</sup> The existing pipeline crosses Treaty 6 & 8 territories, as well as Metis Nation of Alberta (Zone 4) in Alberta. In B.C., it crosses several traditional territories and 15 Reserve lands. Some of the affected Indigenous communities in B.C. are yet to enter agreements giving their consent to the project. For example, representatives of the Coldwater Indian Band, the Tsleil-Waututh Nation, and the Squamish Nation have filed lawsuits in the Federal Court of Appeal to oppose the government's approval of the TMPL. Central to the issues raised against the TMPL Expansion Project is that it constitutes environmental and health hazards to everyone affected, as well as that the Crown has failed to fully discharge its duty to consult with them. Before the government's approval in November 2016, several Indigenous groups had signed mutual benefit agreements that would transfer over \$400 million to them, and several more have signed similar agreements since approval of the project.

See further, Ian Bailey, "B.C. First Nations unite in fight against Trans Mountain pipeline" in *The Globe and Mail*, (January 17, 2017) online: <<http://www.theglobeandmail.com/news/british-columbia/bc-first-nations-unite-in-fight-against-trans-mountain-pipeline/article33653315/>>.

<sup>398</sup> In *Sparrow*, the SCC laid out a test for how government may be justified in infringing existing Aboriginal and Treaty rights that are protected under section 35 of the Constitution. Under the test, an infringement might be justified if 1.) It serves a valid legislative objective; and 2) the government's actions must be consistent with its fiduciary duty towards Aboriginal peoples. Where the government decided that a valid legislative objective exists, it is required to further ensure that a) there has been as little infringement as possible; b) fair compensation has been paid in the case of expropriation of lands, and c) the affected Aboriginal groups were consulted. See also, Natural Resources Canada "Trans Mountain Expansion Project" online: <<http://www.nrcan.gc.ca/energy/resources/19142>>

be met in establishing a valid legislative objective is to ensure that affected Indigenous groups have been fairly compensated. Within the context of the TMPL project, this compensation came in the form of some Indigenous groups' approval to the project, whereby Mutual Benefit Agreements ("MBAs") was signed between affected Indigenous groups and Kinder Morgan.<sup>399</sup>

Since the government's approval of the project in November 2016, more Indigenous groups have signed onto the MBA while others have not; instead, they have resorted to the courts to litigate their rights. It is important to note the use of the term "approval" in the context of what forms the basis of this approval. Of note, some of the Indigenous groups that signed the MBA made the decision to sign simply because they were afraid that if approved, the TMPL project would commence on their lands and they would lose out completely from benefiting from the economic gains or the opportunity to monitor the project, like other groups would.<sup>400</sup> This raises the issue of the legal validity of contracts entered into by Indigenous peoples and project proponents, in terms of whether they were coerced into signing it. This topic is much broader and deserves further discussion and research, with a full treatment being large enough to be another thesis. However, it will be germane to briefly discuss the common law perspectives on parties' rights and free will to enter into contractual agreements.

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<sup>399</sup> Mutual Benefit Agreements, MBAs, are agreements that define the relationship between parties that may include provisions on education, training, job skills, enhancement of community services or infrastructure, business opportunities and other benefits. See, Trans Mountain "Aboriginal Project Benefits online: <<https://www.transmountain.com/aboriginal-project-benefits>>.

<sup>400</sup> *Report of the Working Group*, *supra* note 229 at 56. Indigenous leaders in B.C. have expressed their concerns about monetary inducements unless it is mutually agreed upon, hence the use of MBAs. In order to avoid being in a position where their only option is to take a deal or lose out completely on jobs and profits, they have decided to make their own consultation policies. For example, speaking on Kinder Morgan's monetary offers in return for their consent/approvals, the Chief of Lower Nicola Indian Band in B.C. expressed his fears that even though some of the Band's members were opposed to the project, they were worried that if they did not sign an agreement, the government would approve the project and they would lose out completely from benefiting from it like their neighboring groups would.

See also, Tracy Johnson "First Nations still wary of supporting Trans Mountain expansion" in *CBC Business*, (November 28, 2016) online <<http://www.cbc.ca/news/business/transmountain-first-nations-support-1.3866324>>. See further, Amy Smart, "Better in than out: Why nine Vancouver Island First Nations signed on with Kinder Morgan" in the *Vancouver Sun*, (December 4, 2016) online <<http://vancouversun.com/news/local-news/better-in-than-out-why-nine-vancouver-island-first-nations-signed-on-with-kinder-morgan>>.

Generally, consent under the common law is a derivative of the “consensus” or “will” theory which propounds that contractual obligations are by definition, self-imposed and those factors that indicate an absence of consent are fatal to the existence of a contract. For example, contracts are differentiated based on whether there is “true consensus” of the parties or whether consent is lacking altogether and the courts are simply called upon to decide upon agreements reached by the courts.<sup>401</sup> As a result, parties’ “will” and individualism is stressed as opposed to state impositions as to individual engagement in contracts.

Under common law, the concept that individuals are free to contract with one another governs the modern rules of contract. This is captured in the statement by Sir George Jessel in *Printing and Numerical Registering Co v Sampson*<sup>402</sup> where he held that contracts entered into freely and voluntarily would be held sacred and valid by the courts. Further, P.S. Atiyah expounds the will theory in relation to classical contract law which argues that parties have the autonomy to make their own contracts based on their “free choice” and “will” and that the courts are only summoned to ensure that the agreements reached are adhered to.<sup>403</sup> However, there are key elements that the courts would consider in determining whether or not a contract is valid. They are: offer and acceptance, consideration and the intention to create legal relations. Most relevant to our discussion is the parties’ intention to enter into binding legal relations as it relates to the individuals will to consent to be bound by a mutually agreed contract.

Indigenous groups that have not signed MBAs with the TMPL proponents are either questioning the implications of the effect of the project on their natural habitats and lands, or the limitation of their rights under the MBA. Others have sought legal remedies because they simply do not want their consent bought by huge monetary inducements; they prefer to be properly consulted about the project and be given the right to either consent or withhold from consenting to the project.<sup>404</sup>

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<sup>401</sup> M. P. Furmston, “Cheshire, Fifoot and Furmston’s Law of Contract” (2012: Oxford University Press) at 15.

<sup>402</sup> *Ibid.*, cited at 13 as *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq. 462

<sup>403</sup> P.S. Atiyah, “Rise and Fall of Freedom of Contract” (1979: Oxford University Press) at 408.

<sup>404</sup> To further send home the message of their opposition to the TMPL project, the Coastal First Nations raised a totem pole on Tsleil-Waututh territory in 2013, saying the TMPL will never be built. Totem poles are carvings made from wood that signify hope, healing and protection for the people. The raised totem pole overlooks the Burrard inlet to the holding tanks at Westridge Terminal site where the Kinder Morgan TMPL loads onto tankers. The totem pole has been given the name “Kwel hoy”, meaning “We draw the line.” See, Tsleil-Waututh territory Sacred Initiative, “We draw the line: why the Tsleil-Waututh territory is raising a totem pole in our territories”,

It will be interesting to see the outcome of these lawsuits in terms of the extent of rights held by the aggrieved Indigenous groups, especially since title to the territories in which the pipeline would run has not been established. It is safe to speculate that any decision(s) reached by the courts will greatly affect the status of UNDRIP in Canada's jurisprudence and the requirement of FPIC in resource development on Indigenous lands.

## 4.8. Conclusion

It is becoming imminently imperative for the Government of Canada to take a firm and robust stand on the status of UNDRIP in Canada. Since the passing of UNDRIP in 2007, and up to the Government of Canada's unqualified support for its principles in 2016, it is becoming increasingly necessary for all levels of government to conduct a revamp of their consultation policies to align them with international standards of obtaining consent within consultation.

This will not come easy, but the journey towards a fuller embrace of the UNDRIP principles within consultation practices in Canada has been heralded by the 2014 *Tsilhqot'in* decision. There is no doubt that implementing UNDRIP domestically and in our courts, will not happen in a flash or overnight.<sup>405</sup> However, if the pattern of judicial dialogue in Canada between the courts and Parliament is to be taken into account, the bulk of the work is left to the courts for judicial interpretation.<sup>406</sup> In the next and final chapter, several policy recommendations would be made

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(September 23, 2013), online: <<http://twnsacredtrust.ca/we-draw-the-line-why-the-tsleil-waututh-nation-is-raising-a-totem-pole-in-our-territories/>>.

<sup>405</sup> When UNDRIP was passed in 2007, Canada, alongside with Australia, New Zealand and the United States were the only four countries who opposed the vote while 144 other countries signed on. Today, the Government has not only ratified it, but has further removed its objector status and stated its unqualified support for the UNDRIP principles. This to me is the kind of progress which sheds more hope that section 35 reconciliation objectives articulated in landmark *Delgamuukw* decision can be achieved. For more on the acceptance of UNDRIP in Canada, see, Mieke Coppes, "Canada's Acceptance of the United Nations Declaration on the Rights of Indigenous Peoples: Implications for the Inuit" (August 9, 2016) in the Arctic Institute, online: <http://www.thearcticinstitute.org/canadas-acceptance-declaration-rights-Indigenous-peoples/>

<sup>406</sup> John Ivison, "First Nations hear hard truth that UN Indigenous rights declaration is "unworkable" as law" in the National Post, (July 14, 2016), online: <http://news.nationalpost.com/full-comment/john-ivison-first-nations-hear-hard-truth-that-un-rights-declaration-unworkable-as-law>, where retired SCC justice, Frank Iacobucci, is reported to



on how the UNDRIP principles can be adapted to fit within the current consultation laws in Canada. It is hoped that these recommendations would make implementing UNDRIP less “scary”, and would provide answers to its opponent misconstrued understanding of the FPIC principles as giving veto powers to Indigenous peoples of Canada.

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have said in a similar vein, that the “future legislation will determine whether UNDRIP differs significantly from Canada’s existing jurisprudence on duty to consult.”

## **CHAPTER 5**

### **5. Conclusions**

This thesis has attempted to articulate, in the first and introductory chapter, the legal standards for consent in resource development in Canada. In chapter two, this thesis undertook a jurisprudential analysis of Aboriginal title in Canada. A firm grasp of the doctrine of Aboriginal title in Canada is necessary in order to fully understand the discussion on consent in chapter three and four. Chapter three of this thesis went on to articulate the existing jurisprudence on the duty to consult as it engages resource development. In chapter four, consultation processes of the federal government, the province of British Columbia, as well as, an examination of the decision-making process of an Indigenous group in British Columbia was undertaken. Also, in chapter four, a case was made for free, prior and informed consent as articulated under the UNDRIP to be a pre-requisite to ensuring the smooth execution of resource development projects in Canada's natural resources industry. Chapter four provides some suggestions on how to avoid the delays identified during consultations. The research finds that Indigenous consent should not be a concession from the government whereby the decision on whether or not to adopt the principles enshrined in UNDRIP is dependent on a political party's manifesto or campaign rhetoric. Rather, it concludes that Indigenous consent is sacrosanct and unassailable in achieving peaceful project execution. Finally, this concluding chapter makes several recommendations, foremost being that free, prior and informed consent of Indigenous peoples, and from their perspectives, should be made the goal of consultation when contemplating any major infringements on their traditional lands.

Indigenous consent serves as a strong weapon for the protection of Indigenous peoples' rights, culture and laws in relation to every aspect of their traditional practices on their traditional territories. As long as resource development continues to take place in Indigenous territories, there will continue to be resistance from Indigenous title claimants who insist that consent must be obtained during consultation. Likewise, the government may continue to face opposition forcing the Crown to use its "Sparrow-privileges" in overruling Indigenous consent rights. It is hoped that some of the policy suggestions made under this chapter will proffer some solutions allowing a less-frictional relationship to emerge.

If any development is to be sustainable, the suggestions made in this chapter should be given enough time to germinate and grow. Because it has taken over a hundred years of litigating rights to arrive at the *Tsilhqot'in Nation* jurisprudence in Canada, it is unrealistic to expect that every provincial and federal policy on consultation will be revamped in favour of consent overnight. However, it is hoped that with the adoption of the UNDRIP principles in Canada, the doctrine of FPIC will be a great catalyst towards achieving Indigenous consent in resource development in Canada.

## **5.1. Recommendations to Actors in Resource Development on Indigenous Lands**

Undoubtedly, the duty to consult doctrine has proved to be one of the most instrumental tools that have enabled Indigenous peoples in Canada to put across their concerns arising from any restrictions on the exercise of their constitutionally enshrined rights. Without consultation and negotiation of agreements, it is safe to say that the relationship between the two nations may have collapsed. Today, several scholars, stakeholders and Indigenous and Government sponsored reports confirm that the foundation of a healthy relationship between the Crown and Indigenous nations is hinged on its ability to forge ahead on a platform based on respect for existing Indigenous government, recognition of their rights, and reconciliation of past wrongs meted out to the latter. Where faithfully observed, respect, recognition and reconciliation are capable of driving all players to their preferred relationship.

Several of the suggestions and recommendation to be made under this section have been advanced in other works or reports hence, they are not new.<sup>407</sup> However, what is novel about these suggestions is their application in terms of situating them as consultation goals of negotiating parties. In addition to Impact or Mutual Benefit Agreements, and all other modern forms of achieving consensus via legal contracts, these recommendations, where aptly considered, aims to drive all levels of government in achieving the section 35 goal of

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<sup>407</sup> For more discussion on recommendations made to current consultation practices of the government, see generally, the Report of the Working Group, *supra* note 229.

reconciliation with Indigenous peoples. For clarity, these recommendations are made in threefold to reflect the roles that all negotiating parties should assume in terms of goals to be attained when the government is fulfilling its constitutional consultation duties.

### **5.1.1 The Role of the Government**

UNDRIP provisions usher in a dramatic change for the international recognition and protection of Indigenous peoples' rights worldwide. In particular, the FPIC principle affords Indigenous peoples the avenue to stand firmly whilst united under one unique platform, and to speak regarding how they want third parties to deal on their traditional territories. On the part of the government, embracing the principles enunciated by the FPIC doctrine is the surest way of achieving reconciliation with Indigenous peoples.

In Chapter four, this research examined the Gitksan Nation's consultation process in British Columbia in some detail, and how as with several other Indigenous communities discussed more briefly, decisions are arrived at consensually. Consensual decision-making makes Indigenous communities markedly different from mainstream society such that they are able to arrive at a decision after considering the overall benefit of the proposed action to not only themselves but, according to some Indigenous groups, to future generations of the community as well. This ability to decide consensually allows authorized decision-makers to project the views of the rest of the community members, through its negotiating team. As a derivative of their right to self-determination, Indigenous peoples are able to enter into agreements that reflect their views, as well as, exercise their right to give free, prior and informed consent to a project on their lands.<sup>408</sup>

Where upheld and respected, the right to self-determination promotes reconciliation of Crown-Indigenous government. This research suggests that when Indigenous groups are allowed to make important social, cultural and political decisions that affect their community, including a right to consent to a project on their lands, then the two nations can begin to actualize true reconciliation. In essence, in order to achieve a lasting solution to the increasingly high demands for the exercise of their FPIC rights, government must find a way to implement the principles of UNDRIP to fit within existing Canadian laws on consultation.

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<sup>408</sup> Ward, *supra* note 2 at 55.

Another important matter that needs immediate attention is that upon full ratification, it is incumbent upon the government to play its role in ensuring that the UNDRIP principles are workable within the Canadian jurisprudence on the duty to consult. It is not enough for the government to make affirmative statements on its implementation, there is an immediate need to clarify and design a step by step plan on how policy makers should incorporate the UNDRIP provisions within existing legal regimes. In 2016, a private member's bill, Bill C-262, was introduced in Parliament to require the Government of Canada to take all necessary measures to ensure that the laws of Canada are consistent with the UNDRIP.<sup>409</sup>

For example, Favel and Coates in two separate papers, addressed the issues raised by the problems of implementing UNDRIP and FPIC in Canada, and opined that the present approach by the Government whereby the Declaration is viewed as merely aspirational “could produce discord and negativity rather than providing the basis for further reconciliation.”<sup>410</sup> The scholars were of the view that in order to make UNDRIP workable within the framework of the duty to consult, it will be preferable to approach UNDRIP as a guideline for addressing the needs and aspirations of Indigenous peoples.

This thesis is supportive of this last view, and adds that the preferable approach is for government to fully adopt the principles of FPIC in a manner that allows for all parties to set consent-seeking as a goal during consultation. Undoubtedly, it will be impossible to obtain consent every time consultation takes place, and as such, full accommodation should be made to address all the concerns raised by Indigenous land owners or claimants. Indeed, every time the government exercises its ability to infringe Aboriginal rights by means of its *Sparrow* powers, the message being sent home to its Indigenous citizens is that it can literally force its ways

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<sup>409</sup> Bill C-262 was introduced by Romeo Saganash on April 21, 2016, and is currently at the stage of “Introduction and First Reading in the House of Commons.” If passed into law, it would require the Canadian Government to ensure that its laws is consistent with the UNDRIP principles. See Parliament of Canada online < <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C262&Parl=42&Ses=1>>.

<sup>410</sup> For more discussion on the obstacles to implementing UNDRIP in Canada, see Blaine Favel and Ken S. Coates, “Understanding UNDRIP; Choosing action on priorities over sweeping claims about the United Nations Declaration of the Rights of Indigenous Peoples”, (May 2016), Macdonald-Laurier Institute Publication, at 1 [Favel and Coates]. See also, Ken S. Coates and Blaine Favel, “Understanding FPIC: From assertion and assumption on ‘free, prior and informed consent’ to a new model for Indigenous engagement on resource development” *supra* note 6.

through their homes when after knocking, they refuse to open their doors. Without a doubt, this was not the type of reconciliation envisioned by Chief Justice Lamer in *Delgamuukw* when he stated that “let us face it, we are all here to stay.”<sup>411</sup> In truth, staying reconciled with Indigenous peoples cannot be achieved by force, coercion or use of state power.

Liberally translated, FPIC provides for wide-ranging rights of Indigenous peoples to self-determination, freedom from discrimination and a right to make culturally-informed decisions for the protection of their lands and environment.<sup>412</sup> In order to assure the actualization of FPIC rights, government must ensure that there is increased participation of Indigenous peoples on matters that affect their lives, culture and traditional territories. For example, where a pipeline is purposed to be built on Indigenous territory, communities likely to be impacted by the project should at the inception, be informed about the project, its economic benefits and likely impact of the project to the environment. Further, this initial informational session should not only provide Indigenous communities with full knowledge of the project, but it should also envisage obtaining their views and assuring them that project proponents intend to seek and obtain their approvals to the project through a detailed accommodation of their concerns. Indeed, this approach is more likely to ensure that a social licence to the project is obtained as it lays bare, the economic benefits of the project as well as, reflects genuine respect for their territories as a nation.

Another means of achieving consent in resource development is by providing funding to Indigenous groups in order to allow them to participate meaningfully in consultation.<sup>413</sup> This is an issue that has been identified by case law and scholarly writings. Many reports have also identified lack of funding for consultation to have led to what is termed “process fatigue” which is a major barrier for Indigenous groups’ participation in project assessments and reviews.<sup>414</sup>

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<sup>411</sup> *Delgamuukw*, *supra* note 16 at para 186. Justice Lamer clarified that section 35 goal of reconciliation can ultimately be achieved “through negotiated settlements, with good faith and give and take on all sides”.

<sup>412</sup> Agnes Portalewska, “Free, Prior and Informed Consent: Protecting Indigenous Peoples’ right to self-determination, participation and decision-making” *Cultural Survival Quarterly Magazine*, 36-4 (December 2014) online: <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous>.

<sup>413</sup> *Platinex*, *supra* note 236 at paras 3 and 97.

<sup>414</sup> *Fort McKay First Nation v Alberta (Minister of Environment and Sustainable Resource Development)*, 2014 ABQB 393 at 150, 581 AR 134. See also, Douglas R. Eyford, *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development*, Report to the Prime Minister (November 29 2013) at 8, [Eyford Report].

Consultation has several advantages, including the provision of information about a proposed project. Where Indigenous groups are well-funded and able to conduct independent research into the impacts of a proposed project to their lands and natural resources, they are better equipped with facts and information that will guide them in either approving the projects or making recommendations on how to address any concerns that they might have.<sup>415</sup>

### 5.1.2 The Role of Industry

Before the decision in *Haida Nation*, it was unclear who was primarily responsible for fulfilling the duty to consult, but the Court stated that although third parties are encouraged to initiate consultation with Indigenous groups, “ultimately, the legal responsibility for consultation and accommodation rests with the Crown.”<sup>416</sup> However, the Court went on to clarify that the fact that third parties are not under any legal duty to consult does not translate to their inability to incur liabilities. Where proponents act negligently or breach their contracts with Indigenous groups, they may incur legal liability.<sup>417</sup>

On this premise, industry or project proponents are well-advised to ensure that strategies are put in place to avoid breaching their contractual obligations or duty of care owed to Indigenous groups, and one assured means of achieving this is to strategically hire Indigenous leaders or informed and skilled members within their organizations.<sup>418</sup> Hiring skilled and informed Indigenous staff will obviate some of the problems encountered by project proponents, for example, the inability to communicate with Indigenous leaders, failure to appreciate Indigenous laws, values and culture as well as a lack of robust appreciation of their deep connections to their lands.<sup>419</sup>

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<sup>415</sup> *Nunatukavut*, *supra* note 5 at para 150.

<sup>416</sup> *Haida Nation*, *supra* note 9 at para 53.

<sup>417</sup> *Ibid.*, at para 56.

<sup>418</sup> Michael J. Bryant, *The Case for an Aboriginal Veto in From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal Treaty Rights*, eds. Patrick Macklem and Douglas Sanderson (University of Toronto Press: 2016) at page 223.

<sup>419</sup> Coates and Favel, *supra* note 6 at 6.

Indeed, Canada is far ahead of most other countries in the world when it comes to the entrenchment of Indigenous rights within its constitutional framework. Further, the duty to consult doctrine is highly unique to Canada and it flows from the Crown's honour to Indigenous peoples. However, the government also has a duty to other non-Indigenous Canadians to manage land and resources in a manner that ensures fair distribution of wealth within the society. In essence, the Government of Canada wears two hats in deciding how best to foster a vibrant economy by approving projects that will ensure financial growth within its natural resource industry, and how best to uphold its honour in terms of its fiduciary duties to Indigenous peoples.<sup>420</sup>

With these complexities in mind, project developers become wary of investing in resource development projects in Canada due to the likelihood of disruptions and litigations or protests from Indigenous land owners/claimants. Impact or Mutual Benefit Agreements have been highly instrumental in circumnavigating these problems but Indigenous leaders are beginning to see the monetary benefit offers as bribes or lures into entering into contractual obligations that they view to be in conflict with their conscience and the duty they have to protect their territories. An example is the Pacific NorthWest Liquefied Natural Gas (LNG) project by Petronas. This project has experienced extended delays because the proposed site on Lelu Island is next to a Flora Bank and sandy eelgrass bed which is a vital habitat for juvenile salmon, steelhead and shellfish within the Skeena system in British Columbia. As a result, the Lax Kw'alaams Band rejected Petronas offer of approximately \$267,000 per person and unanimously voted against the project.<sup>421</sup> In addition, several lawsuits have been launched to challenge the federal government's approval of the project.<sup>422</sup> This project, and several others across Canada, drives home the need for

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<sup>420</sup> *Guerin*, *supra* note 143 at para 79.

<sup>421</sup> Martin Lukacs, "By rejecting \$1bn for a pipeline, a First Nation has put Trudeau's climate plan on trial" *theguardian*, (March 20, 2016), online: <<https://www.theguardian.com/environment/true-north/2016/mar/20/by-rejecting-1-billion-for-a-pipeline-a-first-nation-has-put-justin-trudeaus-climate-plan-on-trial>> .

<sup>422</sup> Luutkudziwus, a Gitksan Nation House Group is one of the groups that have launched formal actions to oppose the NorthWest LNG project on Lelu Island for lack of consultation and approval. Totally opposed to the project, they demand that since they were not consulted, the project would be stopped. See Andrea Palframan, "Luutkudziwus and Gwininitxw file judicial review to save the wild salmon of the Skeena –and stop the Petronas LNG pipeline" *Raven – Respecting Aboriginal Values and Environmental Needs*- (January 10, 2017), online: <<https://raventrust.com/2017/01/10/luutkudziwus-and-gwininitxw-file-judicial-review-to-save-the-wild-salmon-of-the-skeena-and-stop-the-petronas-lng-pipeline/>>.



proponents to not only obtain government approval for a project, but also, to obtain consent from the community in order to peacefully execute the projects on their traditional territories.

How can industry obtain Indigenous consent to projects such as the NorthWest LNG project where there has been close to consistent and unanimous rejection and opposition? From the *Haida Nation* premise that third parties could be liable in damages for negligent actions towards Indigenous peoples, best practices should promote the consideration of Indigenous interests at the outset of project proposals and up to approval stages from the government and other regulators. In fact, Coates and Favel are of the view that Indigenous decision-making process should be the foundation of the review process of obtaining support for a project.<sup>423</sup> Where Indigenous perspectives are considered not only by the government, but also by project proponents, affected Indigenous groups are more likely to work with industry in utilizing their traditional knowledge of the lands in designing means of protecting their concerns over the project.

This might entail ensuring that expert negotiators are employed to deal with the legal aspect of negotiating agreements e.g. IBAs, in order to yield optimum results. It is left to parties wishing to deal with Indigenous people to ensure that they acquire the expertise and skills that they need to deal with title claimants and to make concrete commitments to negotiating Indigenous consent to a proposed project as early as possible. Further, early engagement of Indigenous communities by industry is more likely to build a lasting trust and solid relationships. Again, industry can best achieve this by hiring skilled Indigenous members within their strategic and project-planning groups.<sup>424</sup>

### **5.1.3 Role of Indigenous Communities and their Leaders**

Litigation is very expensive and it could go on for years. In several instances, the desired outcome is often not achieved. However, the solace is that litigation, though exhausting, has been

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<sup>423</sup> Coates and Favel, *supra* note 6 at 21.

<sup>424</sup> Eyford Report, *supra* note 414 at 8.

highly successful in advancing Indigenous rights whilst also driving it to the current legal discussion in Canada. Much credit for these advancements go to Indigenous leaders who, frustrated with the imbalance in economic and social status between Indigenous and non-Indigenous Canadians pioneered legal actions. There have been several recorded successes, including the *Tsilhqot'in Nation* decision, and several more could be achieved where concerted efforts are optimized.

FPIC is perhaps, the most hotly debated topic within Indigenous communities in Canada. Indigenous groups want to be meaningfully consulted and in addition, they want to be able to give their consent to projects before it is approved by the government. However, achieving Indigenous consent prior to approvals and commencement of projects can only be achieved by the concerted efforts of all negotiating parties. Indigenous groups in particular, have a reciprocal duty to participate in consultation processes in good faith. As such, where the government is committed to fulfilling its constitutional duty to consult and accommodate, as well as, achieving its reconciliation goal, it is incumbent upon Indigenous groups to be flexible on their stance in a manner that ensures progress is made during consultation and negotiation.<sup>425</sup> Holding fast to a position after all possible mitigating provisions have been made will not allow parties to reach any form of agreement or accommodation of concerns.

Another means of achieving consent is by understanding every stakeholder's concerns. Ultimately, the goal for project proponents is to execute a successful and profitable project, while governments seek to provide citizens with security, jobs, social amenities, safe environment and much more. For Indigenous groups, many have stated that they are not opposed to resource development, rather, they view the land "as a sacred legacy given to them by the creator to manage and protect",<sup>426</sup> and as a result, they want any project carried out on the land to be done on their terms and with their consent. Flowing from the foregoing, several Indigenous organizations have undertaken the task of developing their own consultation guidelines for industry and government wishing to do business on their lands.<sup>427</sup> Concurrently, where consent is

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<sup>425</sup> *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 161, [1999] 4 CNLR 1.

<sup>426</sup> *Platinex supra* note 236 at para 4.

Report of the Working Group, *supra* note 229. More specifically, several guidelines emerged as a result of the decisions in *Haida Nation*, *Taku River* and *Mikisew Cree FN*. Examples are "NStQ Consultation Guidelines: A Guide

required, it is suggested that Indigenous leaders have a role in making sure that there are guidelines to assist proponents in mapping out a route to obtaining their consent for the project.

There are many advantages of having a guideline for obtaining Indigenous consent. Firstly, unlike provincial consultation guidelines, consent guidelines emanate from Indigenous perspectives and ensure that provisions are made for addressing the interests and concerns of affected groups. Secondly, it allows third parties dealing on Indigenous lands to have a reasonable expectation of how to relate with the people, acknowledge their laws and respect their traditional beliefs; and thirdly, and perhaps, most relevant to proponents, is that it is more likely to ensure that approvals for projects are secured in a timely and efficient manner. More than signaling respect for Indigenous rights, consultation channelled at consent-seeking makes it easier to obtain approvals on project in a manner that ensures that high-priority concerns have been addressed.

As historical keepers of the land, Indigenous peoples have the key to unlocking the resource potentials of the land, as well as the ability to dictate how best it should be used for development and social growth. As such, where community consent is sought on a project, affected Indigenous groups have an obligation to participate in the established consultation process in order to discuss their concerns and lay out conditions for approval. More importantly, these consent guidelines should provide proponents with answers on how to address the issues of initial and continued consent where applicable, Indigenous monitory roles, financial benefits and dispute resolution mechanisms outside of the court rooms.

## **5.2 Conclusion**

The last two decades since the *Delgamuukw* decision have seen tremendous evolution in the laws protecting Indigenous peoples' rights to land. This decision remains the starting point for a renewed hope for a declaration of Indigenous title to land in Canada, however, the struggle for

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for Government and Third Parties, 2009", "Horse Lake First Nation Consultation Policy, February 1, 2007" and "Federation of Saskatchewan Indian Nations Consultation Policy, 2006." See Christian Aboriginal Infrastructure Developments online: <<http://caid.ca/consult.html>>

emancipation and total freedom from the shackles of colonization and the effects of the assertion of Crown sovereignty continues. Heralded by the Gitxsan and Wet'suwet'en in *Delgamuukw*, for the first time in over 100 years of Indigenous rights litigation in Canada, the Tsilhqot'in people of B.C. successfully instituted an action for a declaration of Indigenous title to land in Canada.

In chapter one of this research, the legal standards for consent in resource development in Canada was discussed. This discussion revealed the instances when consent will be required from Aboriginal title claimants prior to any resource development proceeding. Accommodation of Aboriginal peoples' rights in land through the process of consultation was also discussed which revealed the uncertainties that could arise in resource development.

In chapter two, the meaning, content and nature of Aboriginal title in Canada was examined. Through scholarly articles, texts and case law, the doctrine of Aboriginal title was analyzed culminating in the SCC *Tsilhqot'in Nation* decision in 2014. This decision greatly informs the overarching goal of this thesis work which suggests that where fully embraced, consent should be viewed as a tool in ensuring that the government meets its obligations to Indigenous peoples when resource development is proposed on their lands. Further, chapter two reveals the importance of making consent *the* goal of consultation which ultimately, will lead to reconciliation of Crown-Aboriginal sovereignty mentioned in the landmark decision in *Delgamuukw*. This theme was further discussed in chapter three where the doctrine of the Crown's duty to consult was examined and the shortcomings of consultation that fails to obtain Indigenous consent was discussed.

The *Delgamuukw* decision is highly important to chapter four because it informs the consultation practices of the federal government, the province of British Columbia and a select Indigenous group discussed in the chapter. By looking at how the Gitxsan people of British Columbia make decisions as a group, an examining of their traditional laws, political structure and decision-making process was undertaken. The overall goal of chapter four was to show how Indigenous decision-making can be instrumental in fashioning new consultation policies aimed at obtaining Aboriginal consent in resource development in Canada. It is safe to say that without the foundational holdings in the *Delgamuukw* case, Aboriginal people may still be hotly litigating, and government, debating the existence of Aboriginal title in Canada.

Finally, chapter five concludes with several suggestions to the government, project proponents and Indigenous people on how to move forward in ensuring that Indigenous peoples' perspectives are considered prior to the commencement of projects on their lands. It is anticipated that the next few years will usher in several developments, notably, in the interpretation of the FPIC doctrine and its applicability to existing laws and policies on consultation with Aboriginal title claimants. It is hoped that government, project proponents and Indigenous people nationwide will make concerted efforts to fashion out solutions to implementing the UNDRIP principles because, indeed, it has come to stay.

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